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ABSTRACT

This packet is designed to assist legal services offices in challenging fees assessed for textbooks, student activities, materials, or similar items. The material includes (1) draft paragraphs for a complaint in a Federal or State court; (2) excerpts from a brief submitted to the U.S. Supreme Court in support of a petition for writ of certiorari in Johnson vs New York State Education Department from an adverse Second Circuit decision; (3) a copy of the Seventh Circuit's order in Williams vs Page (holding that a cause of action exists in a complaint alleging violation of equal protection); (4) a "model brief" in support of a State court action, and (5) a discovery checklist. (Author/JF)

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STUDENT FEES

Prepared by the
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The Center for Law and Education is an inter-disciplinary research institute established by Harvard University and the United States Office of Economic Opportunity to promote reform in education through research and action on the legal implications of educational policies, particularly those affecting equality of educational opportunity.

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HARVARD UNIVERSITY
CENTER FOR LAW AND EDUCATION

38 Kirkland Street
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TO: Legal Services Offices

FROM: Center for Law and Education

RE: Packet on School Fees [Revised edition, March 1972]

Many school districts, tight-pressed for funds, are asking students to pay various sorts of fees--for text books, student activities, materials or similar items. These fees can be challenged on a variety of grounds in federal court, and often, in state courts. To aid you in contesting these fees this packet was prepared. It contains: (1) draft paragraphs for a complaint in a federal or state court action, (2) excerpts from a brief submitted to the U.S. Supreme Court in support of a petition for writ of certiorari in Johnson v. New York State Educ. Dept., from an adverse Second Circuit decision, (3) a copy of the seventh circuit's order in Williams v. Page (holding cause of action exists in complaint alleging a violation of equal protection), (4) a "model brief" in support of a state court action and (5) a discovery checklist.

Whether to sue in state or federal court is a difficult question. Its final resolution may depend on the outcome of the Johnson case, and/or the precedent in a particular federal jurisdiction. In general, state courts offer plaintiffs a better chance because there is weightier state precedent. Fees have been viewed with disfavor by courts often considered "conservative" in Arkansas, Kansas, Oklahoma, Georgia, and Idaho. In addition, federal equal protection action can ask for relief only for poor persons, while state actions ask for a ban on fees charged to all persons. Unless, then, there is a good reason for going into federal court (e.g., the complete absence of a "free" or "common" school clause in state constitution or statutes, and the most unfriendly state judges compared to angels on the federal side), state suits seem advisable.

We would appreciate attorneys with pending cases forwarding to us copies of court orders obtained so that we may include them in future printings of this packet.

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SAMPLE PARAGRAPHS FOR A COMPLAINT ALLEGING A VIOLATION OF THE STATE CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION WHERE A SCHOOL DISTRICT CHARGES FEES

1. [Identification of parties, jurisdiction, etc. Federal Court jurisdiction is based on 28 U.S.C. 1331, 1337, 1343; the claim arises under the Fourteenth Amendment, 42 U.S.C. 1983 and 1988; the Court is empowered to grant declaratory relief by 28 U.S.C. 2201 and 2202.]

2. [Statement of facts.]

3. [Class Action Allegation] The plaintiffs bring this action on behalf of themselves and all persons similarly situated. Plaintiffs represent a class of persons whose children attend _____'s (defendant's) schools and are charged compulsory fees as an incident to attendance at school or as an incident to full access to [essential] educational benefits made available by the _____ (defendants). In addition, _____, plaintiffs, who are too poor to pay fees, represent a separate class of persons whose children attend _____'s [defendants'] schools and are financially unable to pay the fees and whose children have been denied benefits of the educational services offered by (defendants). Finally, plaintiffs _____ (persons who have been penalized for failure to pay fees) represent a separate class of persons whose children have been penalized for their failure to pay fees. Plaintiffs _____ are members of this latter group are too poor to pay fees.

The members of the respective class are so numerous that joinder of all members is impractical.

The questions of law and fact under the Fourteenth Amendment to the United States Constitution are common to _____ [plaintiffs too poor to pay fees] and the class of persons which they represent. The questions of law and fact under the state statutes are common to _____ [plaintiffs whose children have been penalized] and the class of persons they represent. In addition, the claims of the named plaintiffs are typical of the claims of the class and they will fairly and adequately protect the interests of the class. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. The questions of law and fact common to the members of the class also predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. [Statement of Claims under the Federal Constitution, Equal Protection Clause] _____ [plaintiffs too poor to pay fees] and the class of persons they represent are financially unable to pay the required fees. Defendants have singled out this class of persons and denied their children the full benefits of educational services made available to wealthier children by the defendants, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

[If there is an equal protection clause in the state constitution this should be contained in an additional cause of action similar to the above.]

5. [State action only; statement of claim under state constitutional provisions] [The sections requiring free schools or common schools, any sections which give children a right to education, and related statutory provisions should be cited; if a state constitution provides for common schools it should be also noted that "The courts have decided, and the original definition requires, that common schools be public schools which are free of all charges."]

The defendants' fees policy places a charge on a portion of the school system's educational services, which _____ [applicable provisions of state laws of constitution] require[s] to be provided free of charge. In addition, the defendants' fees policy operates as an incidental charge, or admissions fee, for some students, and results in a denial of access to all educational benefits, which the _____ [state laws or constitution] require[s] be provided free of charge.

6. [State action only; statement of ultra vires claim] The defendants, as public officials, have only the power and authority expressly granted or fairly implied by the state legislature. The authority to charge school fees has not been granted. There is no statute expressly authorizing the fees policy and it cannot be fairly implied from other statutes which grant defendants authority. Therefore, the defendants' fees policy exceeds their statutory authority and is ultra vires.

7. [Prayer for relief] WHEREFORE, on behalf of themselves and all others similarly situated, plaintiffs respectfully pray that this court:

a. Enter a judgment that the defendants' fees policy violates the Fourteenth Amendment to the United States Constitution on its face and as applied; and preliminarily and permanently enjoin the defendants and their agents from requiring plaintiffs [names of those too poor to pay fees] and the class of persons they represent--those who are financially unable to pay the required fees--to pay schools fees as a condition to receiving any element of the educational services offered by the defendants, or as an incident to attendance at any of the defendants' schools.

b. [State action only] Enter a judgement that the fees policy violates the state constitution, sections _____ and permanently enjoin the defendants and their agents from requiring plaintiffs and the class of persons they represent to pay school fees for any element of educational services offered by defendants, or as an incident to attendance at school.

c. [State action only] Enter a judgement that the fees policy and punishment thereto exceed defendants' statutory authority and permanently enjoin the defendants and their agents from punishing plaintiffs and the class of persons they represent.

d [Optional, depending on circumstances] Award damages to plaintiffs who have paid unauthorized and invalid fees since [September, 1970], valued at $ _____.

e. Granting such other and further relief as the needs of justice may require.

Excerpts From:

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5685

DAISY JOHNSON, ET AL., PETITIONERS,

v.

NEW YORK STATE EDUCATION DEPARTMENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION HARVARD UNIVERSITY, AND THE UNITED MINISTRIES IN PUBLIC EDUCATION, IN SUPPORT OF THE PETITION

B. The Court of Appeals Decided Fourteenth Amendment Issues in a Way in Conflict with Decisions of this Court.

1. *Preliminary Statement: the Procedural Posture*

The procedural posture of this case is significant. The district court dismissed the complaint for failure to state a claim without requesting that a three-judge court be convened, even though the complaint sought, in part, the enjoining of Section 701 of the Education Law. (App. at 15.) (See 28 U.S.C. 2281, 2284.) The Court of Appeals affirmed. The inquiry accordingly must focus on whether plaintiffs' claim is substantial. See *e.g. California Water Services* v. *City of Redding*, 304 U.S. 252, 255. We maintain that it is, given past decisions of this Court with which the ruling below conflicts, and the requirement that on motion to dismiss the well-pleaded allegations of the complaint and affidavits must be taken as true.[8]

The majority below suggested that this might not be a proper case for a three-judge court. (Slip Op. at 4660, n. 8.) However, even if the lower court viewed the case as involving only an application of the statutory scheme,[9] not requiring a three-judge court, the motion to dismiss should have been denied.

26, 1971), holding that it violates the Fourteenth Amendment to suspend a *student* for three days because of the failure of his *parents* to pay a school fee. The thrust of the decision is that education is a fundamental right, and that a student's right to an education can not be conditioned on factors over which he has no control.

[8] *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172 (1967); *Cooper* v. *Pate*, 378 U.S. 546.

[9] The complaint challenges, *inter alia*, the application of the statutory scheme to indigent students. (App. at 13-14: Third Claim.) See also *Roddie* v. *Connecticut*, 91 S.Ct. 780, 787, and the dissenting opinion of Judge Kaufman below. ("I dissent and would hold that plaintiffs have established at the very least a substantial claim that *as applied* in . . . District No. 20 . . . New York Education Law §703 deprives indigent children of the equal protection of the laws." (Slip Op. at 4663-4664; emphasis added; footnote omitted.)

Given the allegations of the complaint and affidavits, the admissions of the local defendants and pertinent substantive case law, it can not be said that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46; 2A Moore's Federal Practice, § 12.08, at 2271-74 (2d ed., 1968), quoted in *Williams* v. *Page*, —— F. 2d —— (C.A. 7, 1971), discussed above at 12-13.[10]

The three-judge court procedure may not be working as originally envisioned.[11] However, frustration at the process can not be a basis for penalizing plaintiffs whose claims satisfy the standard for convening the statutory court.

2. *The Standard for Reviewing the Challenged Classification.*

Each of the lower courts considered the standard of equal protection review applicable in this case, *i.e.*, "rational relationship to a legitimate state end" (*McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809), or "necessary to promote a compelling state interest." *Kramer* v. *Union Free School District*, 395 U.S. 621, 627. The district court purported to apply the compelling interest standard, finding it satisfied. (319 F. Supp. at 278.) While approving this conclusion, the Court of Appeals held that decisions

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[10] Finally, the court below suggested that it might be necessary for plaintiffs to amend the complaint "to attack the constitutionality of the voter's action." (Slip Op. at 4660, n. 8.) However, plaintiffs did allege the voter's action and challenge the statutory scheme as denying Fourteenth Amendment rights to indigent students. (App. at 7, 12-13.) This surely was adequate. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 46.

[11] See the discussion by the majority and Judge Kaufman below. (Slip Op. at 4650-4655, 4664-4666.)

of this Court "would indicate that [the rational basis] standard . . . is also appropriate in cases such as this." It then upheld the challenged statutory scheme. (Slip. Op. at 4655-4656, 4656-4663; explanation added.)

We demonstrate below that the lower courts applied each standard "in a way in conflict with applicable decisions of this court; . . ." Supreme Court Rule 19(1)(b). We wish to stress at the outset, however, our view that the challenged statutory scheme should be judged by the compelling state interest test. It "must be closely scrutinized and carefully confined" (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670) because, as the local defendants admit, the classification at issue burdens *education*, a "fundamental interest", and draws lines based upon *wealth*, a "suspect" classifying factor.

a) *Education is a "fundamental interest"*

In 1954, this Court unanimously stressed the fundamental importance of educational opportunity in *Brown* v. *Board of Education*, 347 U.S. 483, 493.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

> denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

During the October, 1970 Term, the Court reiterated this view on the importance of education, quoting from the same part of *Brown I* in *Palmer* v. *Thompson*, 91 S. Ct. 1940, 1943, n. 6.[12] In this case, despite ruling against plaintiffs, the Court of Appeals majority characterized education as "no doubt an area of fundamental importance" (Slip Op. at 4661), a conclusion with which Circuit Judge Kaufman dissenting agreed. (*Id.* at 4667-4669.)

Other lower federal courts have recognized that education is a "fundamental interest". In *Hosier* v. *Evans*, 314 F. Supp. 316 (D. Vir. Is., 1970), the court invalidated, on equal protection grounds, a regulation permitting the exclusion from school of "non-immigrant visitors". In stressing the importance of education, District Judge Christian stated (*Id.* at 319): "We are here dealing with an aspect of twentieth century life so fundamental as to be fittingly considered the corner stone of a vibrant and viable republican form of democracy, such as we so proudly espouse, *i.e.*, free and unrestricted public education." The court rejected the government's argument that existing facilities would become overcrowded, writing: "The short answer to that argument is that *fundamental rights* guaranteed by the Constitution may be neither denied nor abridged solely

[12] In *Palmer*, this court distinguished the closing of swimming pools involved in *Palmer*, and public schools in *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La., 1960), *affirmed per curiam*, 365 U.S. 569, stating: "Of course that case [*Bush*] did not involve swimming pools but rather public schools an enterprise we have described as 'perhaps the most important function of state and local governments.' *Brown* v. *Board of Education* . . . ." *Palmer*, *supra*, 91 S.Ct. at 1943, n. 6; see also 1947 (concurring opinion of Blackmun, J.)

because their implementation requires the expenditure of public funds." 314 F. Supp. at 320. (emphasis added.)

In *Ordway* v. *Hargraves*, 323 F. Supp. 1155 (D. Mass., 1971), the court held impermissible a school board's exclusion from regular classes of a pregnant girl. In the course of the opinion, the district judge stated: "It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities (citation omitted)." The court found no such justification. (*Id.* at 1158.)[13]

The California Supreme Court has recently considered statutory classifications touching upon education, and challenged on equal protection grounds. *Serrano* v. *Priest*, 487 P. 2d 1241 (1971). In an opinion, discussing its own decisions and those of this Court, commentaries[14] and other

[13] See also *Van Dusartz* v. *Hatfield*, C.A. No. 3-71 Civ. 243 (D. Minn., Memorandum and Order, October 12, 1971), holding education a "fundamental interest" for purpose of determining appropriate standard of equal protection review. ["Education has a unique impact on the mind, personality, and future role of the individual child. It is basic to the functioning of a free society and thereby evokes special judicial solicitude. (Footnote omitted.) Mem. Op. at 7.] *Hargrave* v. *McKinney*, 413 F.2d 320 (C.A.5., 1969), *Hargrave* v. *Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated and remanded on other grounds, sub nom. Askew* v. *Hargrave*, 401 U.S. 476; (". . . interests which may well be deemed fundamental . . ." 413 F. 2d at 328); *Dixon* v. *Alabama*, 294 F.2d 150 (C.A. 5, 1961), holding due process requires notice and opportunity for hearing prior to expulsion of students from public college. ("It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Id.* at 157, per Rives, J.)

[14] Commentaries support our position that education should be considered a "fundamental interest." Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L.Rev. 305, 382-389 (1969); Kirp, *The Poor, The Schools and Equal Protection*, 38 Harv. Ed. Rev. 635,

pertinent factors, the court concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." (487 P.2d at 1258; footnote omitted.)

Education is precious not only in its own right, but also because it provides the tools necessary for exercising other rights which this court has recognized as fundamental — voting (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663); speech (*Lovell* v. *City of Griffin*, 303 U.S. 444, 450); association (*NAACP* v. *Alabama*, 357 U.S. 449); and travel (*Shapiro* v. *Thompson*, 394 U.S. 618, 629-631).

"[E]ducation underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and the quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him." [15]

The courts' statements are not merely rhetoric; all of the other institutions of government reflect similar concern for education. The last four presidents of this nation have expressed agreement with the courts.[16] Congress has enacted legislation providing funding for educational programs.[17] Education is made compulsory for at least ten

642-645 (1968); Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 28, 48 (1969).

[15] Coons, Clune and Sugarman, *supra* n. 14, at 368.

[16] *President Nixon:* 1969 U.S. Code Cong. and Adm. News at 2830 (Proclamation on American Education Week; September 26, 1969); *President Johnson:* 1968 Code at 4648-9 (Proclamation on American Education Week; August 29, 1968); 1965 Code at 1448-9 (Message on Education Act of 1965); *President Kennedy:* 1963 Code at 1450 (Education Message to Congress; January 29, 1963); *President Eisenhower:* 1958 Code at 5412 (Education Message).

[17] *See e.g.* Elementary and Secondary Education Act of 1965, 20 U.S.C. 236-244, 331, 332, 821-827, 841-848, 861-870, 881-885, National Defense Education Act of 1958, Title 20 U.S.C. and Johnson-O'Malley Act, Title 25 U.S.C.

years by New York and all but three of the other states.[18] New York's Constitution provides in Article XI, Section 1:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

And, in fiscal 1968, 35 percent of New York's state and local tax dollars were spent on public schooling.[19]

We note that it is not necessary to recognize a federal constitutional right to an education in order to classify education a "fundamental interest". In a series of cases, this court has held qualifications for voting in state elections violative of the equal protection clause of the Fourteenth Amendment by application of the more stringent standard of review. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670; *Kramer* v. *Union Free School District*, 395 U.S. 621, 627, 630; *Cipriano* v. *City of Houma*, 395 U.S. 701, 704; *Evans* v. *Cornman*, 398 U.S. 419, 422.

These cases rest not on a federal constitutional right to vote, but on the ground that "once the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper, supra*, 383 U.S. at 665; see also *Kramer, supra*, 395 U.S. at 629.[20] Indeed, in *Harper*, while noting that "the

[18] N.Y. Education Law, § 3205(1)(a); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: Non-Constitutional Analysis*, 117 U. Pa. L. Rev. 373, 393-4, n. 74 (1969).

[19] Calculated from Advisory Commission on Intergovernmental Relations, State and Local Finances, Tables 8 and 12 (1969).

[20] Compare *Griffin* v. *Illinois*, 351 U.S. 12, 18. ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, *McKane* v. *Durston*, 153 U.S. 684, 687-688 . . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."); and *Brown I*, *supra*, 347 U.S. at 494. ("Such an opportunity [of an education] where the state has undertaken to provide it, is a right which must be made available to all on equal terms.")

right to vote in federal elections is conferred by Art. I, § 2 of the Constitution," the Court found it unnecessary to decide whether "the right to vote in state elections" is conferred by the federal constitution. *Harper, supra*, 383 U.S. at 665. The challenged statutes were subject to more stringent review in these cases because voting was viewed as "fundamental" and "preservative of other basic civil and political rights" (*Harper, supra*, 383 U.S. at 667) and at the "foundation of our representative society." *Kramer, supra*, 395 U.S. at 626.[21] As we have shown, education is in the same position.

b) *Wealth is a "suspect" classifying factor*

Our contention that the statutory scheme must be judged by the compelling interest standard is buttressed by the fact that the admitted *impact* of the statutory scheme is to classify students based upon the affluence of their families. "Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." *Harper* v. *Virginia State Board of Election Commissioners*, 383 U.S. 663, 668. [22] While rejecting plaintiff's claims, the court below agreed with plaintiffs' allegation that the statutory scheme would operate to stigmatize poor children (see Statement *supra* at 7), similarly to segregation based upon race

[21] The court quoted from *Yick Wo* v. *Hopkins*, 118 U.S. 356 370 and *Reynolds* v. *Sims*, 377, U.S. 533, 561-62, respectively.

[22] See also *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Douglas* v. *California*, 372 U.S. 353; *Williams* v. *Illinois*, 399 U.S. 235; *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 807. ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections*, *supra*, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas* v. *California*, 372 U.S. 353 . . . ; *McLaughlin* v. *Florida*, 379 U.S. 184 . . .") (dictum).

in the dual system. See *Brown I, supra,* 347 U.S. at 494.[23] We note also that poor children, punished here for reasons wholly beyond their own control, "are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson,* 91 S. Ct. 1848, 1852 (quoting *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153, n. 4).

In cases which we have cited, lower federal courts and the California Supreme Court have concluded that the more rigorous standard of review is particularly appropriate when a case involves both the interest in education, and wealth classifications. *Van Dusartz* v. *Hatfield,* C.A. No. 3-71 Civ. 243 (D. Minn., October 12, 1971) (Mem. Op. at 6, 8); *Hargrave* v. *Mckinney, supra* at 413 F.2d 328; *Serrano* v. *Priest,* 487 P.2d 1241, 1250-1259 (S. Ct. Cal., 1971). See also *Hobson* v. *Hansen,* 269 F. Supp. 401, 513 (D.D.C., 1967), *affirmed, sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir., 1969).[24]

[23] In his dissenting opinion, Circuit Judge Kaufman stated: "In short, the legislative scheme here creates two classes of children, not physically separate yet unequal — the poor suffer while the rich receive the full benefits of the state's educational program. But '[l]ines drawn on the basis of wealth or property, like those of race . . . . , are traditionally disfavored.' *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 668 (1966)." (Slip Op. at 4670.)

[24] Our contention that, on the facts of this case, wealth is a "suspect" classifying factor is consistent with *James* v. *Valtierra,* 402 U.S. 137. The lower court in *Valtierra* held that Article XXXIV of the California Constitution violated the equal protection clause of the Fourteenth Amendment, focusing on the fact that *on its face* Article XXXIV "applic[d] only to 'low income persons' . . . ." (313 F. Supp. at 4.) In reversing this Court viewed plaintiffs' challenge as directed *to the face* of the provision: "[A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative." (402 U.S. at 141-142.)

In contrast, the admitted *impact* of the statutory scheme here is to apportion educational opportunity along lines of wealth. *Valtierra* may suggest that facial racial classifications are more carefully scrutinized than those based upon wealth, but construing *Valtierra* to foreclose our argument on wealth classification requires acceptance of the proposition that this Court limited, *sub silentio,* more than 15 decisions holding practices having an *impact* along lines of wealth violative of the Fourteenth Amendment. (See cases cited *supra* at 21, n. 22, and *infra* at 23-25, 29.)

3. *The Decision Below Conflicts with this Court's Rulings on the Scope of the Fourteenth Amendment in Griffin* v. *Illinois,* 351 U.S. 12, *Douglas* v. *California,* 372 U.S. 353 and *Subsequent Cases*

a) *The Fourteenth Amendment principles established in Griffin-Douglas* and subsequent *cases*

In *Griffin* v. *Illinois,* 351 U.S. 12, this Court held that the Illinois system of criminal, appellate review, challenged by indigent defendants because of its failure to provide for free trial transcripts in the circumstances of their case, violated the Fourteenth Amendment by denying them the "adequate appellate review accorded to all [with] money enough to pay the costs in advance." *Griffin, supra,* 351 U.S. at 18. The state "concede[d] that . . . petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors." *Griffin, supra,* 351 U.S. at 16.

This Court decided *Griffin* on the premise that Illinois was not required by the Federal Constitution to afford any appellate review. "But that is not to say that a state that does grant appellate review can do so in a manner that discriminates against some convicted defendants on account of their poverty." *Griffin, supra,* 351 U.S. at 18.[25] Finally, emphasizing its antipathy to wealth classifications,

[25] It is clear, therefore, that the decision below cannot be supported by any right-privilege rationale. See also *Graham* v. *Richardson,* 91 S.Ct. 1848, 1853.

the Court stated: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin, supra,* 351 U.S. at 19.

Griffin has had a steady growth. For example, in *Douglas* v. *California,* 372 U.S. 353, indigent criminal defendants challenged an appellate court's failure to appoint counsel to present their appeals. The court relied upon a rule requiring such appointment only if it determined, after examining the record, that counsel would be helpful to the defendant or the court. This Court, viewing the procedure as one in which "the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot", held that "an unconstitutional line [had] been drawn between rich and poor." *Douglas, supra,* 372 U.S. at 357.

In six cases in addition to *Griffin* and *Douglas,* this Court has held violative of the Fourteenth Amendment procedures nominally available to all criminal defendants or accused persons, but actually available in a less adequate form to indigents because of their poverty.[26] Finally, in four cases, the *Griffin* principle has been applied in instances where some requirement imposed by the State made entirely unavailable to the indigent defendant a remedy fully open to more affluent persons. For example, in *Burns* v. *Ohio,* 360 U.S. 252, payment of a $20 fee was required to invoke the criminal, appellate jurisdiction of

[26] *Eskridge* v. *Washington State Bd.*, 357 U.S. 214 (free transcript for appeal only if trial judge concludes justice promoted); *Swenson* v. *Bosler*, 386 U.S. 258 (no provision for counsel to brief appeal of convicted indigent); *Draper* v. *State of Washington*, 372 U.S. 487 (free transcript for appeal only if trial judge makes certain findings); *Long* v. *District Court*, 385 U.S. 192 (no provision for free transcript for indigent's appeal from denial of habeas corpus petition); *Gardner* v. *California*, 393 U.S. 367 (no provision for free transcript of hearing denying habeas corpus petition, where a *de novo* hearing on petition in appellate court); *Roberts* v. *LaVallee*, 389 U.S. 40 (no provision for free transcript for indigent—accused of testimony of witnesses at preliminary hearing).

the Ohio Supreme Court. Since the remedy was fully available to more affluent persons, the Court held that the fee requirement was violative of the Fourteenth Amendment as construed in *Griffin.*[27]

During the past two terms, this Court has again demonstrated its antipathy to wealth classification. In two cases "[a]pplying the teaching of the *Griffin* case", the Court has held "that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense." *Williams* v. *Illinois,* 399 U.S. 240, 241; see also *Tate* v. *Short*, 91 S. Ct. 668.

b) *The Court of Appeals erroneously construed Griffin-Douglas and their progeny*

There is a striking parallel between the pivotal facts in *Griffin-Douglas* and this case. (1) Plaintiffs have a right under state law to attend public school, as petitioners in *Griffin-Douglas* had a right under state law to appeal their convictions. (2) Here, as in *Griffin-Douglas,* something, unavailable to indigents,[28] is an essential tool for enjoy-

[27] See also *Smith* v. *Bennett*, 365 U.S. 708 ($4 filing fee for appellate review of denial of habeas corpus petition); *Lane* v. *Brown*, 372 U.S. 477 (filing of transcript — available to indigent only on request of public defender — necessary for appellate jurisdiction to review denial of *coram nobis* petition); *Williams* v. *Oklahoma City*, 395 U.S. 458 (filing of "case made" in appellate court necessary to invoke jurisdiction to review criminal conviction).

[28] It is true that the Court of Appeals suggested that the "fixed allowance" plaintiffs received under New York's Welfare law "was intended to cover this as well as other contingent needs." (Slip Op. 4649, n. 3.) Of course the suggested intent of the law is irrelevant; whether or not the parents were able to pay the fee is a question of fact.

Since this case was decided on a motion to dismiss, plaintiffs' affidavits and allegations of their inability to pay the fees must be taken as true. See *e.g. Cooper* v. *Pate*, 378 U.S. 546; *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 172.

ment of the right. (3) Without books, similar to an indigent without a transcript or an attorney, a student from an indigent family is denied the full benefit of the right "accorded to all [with] money enough to pay the costs in advance." *Griffin* v. *Illinois*, 351 U.S. 12, 18.

The equal protection clause is as clearly violated when the quality of education a child receives depends upon the affluence of his parents, as where "the kind of trial a man gets depends on the amount of money he has." *Griffin, supra*, 351 U.S. at 19. Indeed, in this case, unlike *Griffin*, children are punished for "no action, conduct or demeanor of theirs" (*Levy* v. *Louisiana*, 391 U.S. 68, 71), but instead because of their families' indigency wholly beyond their own control.

Despite the obvious parallels between *Griffin-Douglas*, their progeny, and this case, the lower courts rejected plaintiffs' povery claim. (The District Court did not even mention the claim.) We submit that the court below decided the Fourteenth Amendment issues "in a way in conflict with applicable decisions of this court; . . ." (Supreme Court Rule 19 (1)(b).)

The Court of Appeals rejected the poverty contentions because "[t]he reasoning of [the] cases [relied upon by plaintiffs] [29] is that the State is required to provide these services and access because to do otherwise would be to deprive indigents of due process. Obviously, though, due process is not involved here." (Slip Op. at 4661.) The court also argued that "such money as the School Board has to spend is being spent in such a way as to benefit all students (i.e. on teachers' salaries, building maintenance and the like). (footnote omitted.)" (Slip Op. at 4662.) Finally, while acknowledging that students whose families

[29] The court cited: *Boddie* v. *Connecticut*, 91 S.Ct. 780; *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Gideon* v. *Wainwright*, 372 U.S. 335.

could afford texts would no doubt receive a better education, the court said that this was due to their own means and not because the State provided them more. (Slip Op. at 4663.)

Any surface plausibility of this reasoning does not withstand scrutiny. First, as noted by Judge Kaufman in dissent, *Griffin* "rested by its own language squarely on the equal protection guarantee, as well as on due process . . . ." (Slip Op. at 4751.) See *Griffin, supra*, 351 U.S. at 13, 18.[30] Second, no distinction can be made because this case involves education rather than the criminal process. The Fourteenth Amendment makes no such distinction between criminal and other matters and this Court has not so construed it.[31] The *Griffin* opinion emphasizes the importance of fairness in the criminal process, but education is at least as important, as our argument at pages 16-21 demonstrates. Moreover, education may serve to make unneeded protection in the criminal process.[32]

Third, it could have been argued in *Griffin-Douglas* where appellate review was nominally available to the indigent, as the lower court did here, that "such money as the [State had] to spend [was] being spent in such a way as to benefit all [defendants]", that is, on salaries for judges and clerks, building maintenance, etc., and that

[30] See also *Griffin, supra*, 351 U.S. at 34 (dissenting opinion of Harlan, J.); and *Williams* v. *Illinois*, 399 U.S. 235, 241, explaining *Griffin* as finding "a violation of the Equal Protection Clause . . . ."

[31] See *e.g. Boddie* v. *Connecticut*, 91 S.Ct. 780; *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663; *Brown* v. *Board of Education*, 347 U.S. 483.

[32] See Coons, Clune and Sugarman, *supra*, n. 14, at 362. ["Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society . . . ." (footnote omitted.)] See also *Johnson* v. *Avery*, 393 U.S. 483, 487. ("Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited." footnote omitted.)

to the extent the affluent defendant had a more adequate appeal, this was a result of a private supplement. In fact, similar contentions were urged *in dissent* by Justice Harlan in both *Griffin* and *Douglas*.[33] A majority of this Court held, however, that in certain contexts the Fourteenth Amendment requires more than simply facial neutrality.[34]

Strictly speaking, it would appear that in *Griffin-Douglas*, and this case, Fourteenth Amendment obligations could be satisfied by ways other than furnishing free a transcript, counsel or books. Thus, the state could release an indigent defendant[35] and the curriculum could be other than textbook orientated. However, to the extent that furnishing a transcript, counsel or books is the most likely state response, the affirmative action here is precisely analogous to *Griffin-Douglas*.

This Court has approved affirmative remedial action to provide equal educational opportunity. The *Brown I* opinion stated that the opportunity of an education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown I, supra*, 347 U.S. at 483, 493. Thereafter, in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218, 233, this Court held that the district court had the authority to direct public officials to exercise their power to raise funds adequate to operate a racially non-discriminatory school system. And finally, in the past term, the Court upheld unanimously the order of a district court which

[33] *Griffin, supra*, 351 U.S. at 34; *Douglas* v. *California*, 372 U.S. 353, 361-362.

[34] "Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Griffin, supra*, 351 U.S. at 18, n. 11; see also *Williams* v. *Illinois*, 399 U.S. 235, 242.

[35] "(3) The remedy for the discrimination is simple, clear and effective — *i.e.*, give the appellant a transcript (and a lawyer) or else let him go; . . ." Coons, Clune and Sugarman, *supra* n. 14, at 362.

required state officials to provide substantial, additional student transportation. *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1. See also *United States* v. *School District 151 of Cook County, Illinois*, 301 F. Supp. 201, 232 (N.D. Ill. 1969), *affirmed as modified*, 432 F.2d 1147 (C.A.7, 1970) *cert. denied*, 402 U.S. 943; *Hosier* v. *Evans*, 314 F. Supp. 316, 320 (D. Vis. Is., 1970).

Our contention that plaintiffs present a substantial claim is buttressed by decisions of this Court invalidating, on Fourteenth Amendment grounds, fees in two additional areas. In each case, the Court's opinion stressed the fundamental interest involved. See *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663; *Boddie* v. *Connecticut*, 91 S. Ct. 780. In striking down Virgina's $1.50 poll tax, this Court stated in *Harper*: "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper, supra*, 383 U.S. at 670. The *Boddie* case involved fees for the commencement of divorce litigation. The Court held that the due process clause prohibited Connecticut from denying access to the courts to indigents seeking divorces in good faith, emphasizing "the basic position of the marriage relationship in this society's hierarchy of value. . . ." *Boddie, supra*, 91 S. Ct. at 784.

This case too, as we have shown, involves a fundamental interest. Here, as in *Harper*, "wealth or fee paying has . . . no relation to [an education]; the right to [an education] is too precious, too fundamental to be so burdened or conditioned."

4. *The Decision Below Conflicts with Rulings of this Court Applying the "Compelling State Interest" Standard of Review*

We maintain for the reasons set forth above that the challenged legislative scheme must be judged by the "com-

pelling state interest" standard. The district court purported to apply this test, finding it satisfied. (319 F. Supp. at 278.) The court reasoned that the classification was adequately justified by the adoption of a scheme which would, in the court's view: 1) advance the legislatures "legitimate interest in conserving the State's fiscal resources. . . ." (*Id.* at 279;) 2) insure "that as many as possible of [New York's] children receive textbooks" (*Id.* at 279-280;) and 3) fulfill "[t]he legislature's desire to foster the study of certain subjects [the sciences, mathematics and foreign languages]. . . ." (*Id.* at 280.)

The majority below approved the district court's conclusion on the compelling interest test (Slip Op. at 4655-4656), thereby incorporating the district judge's erroneous application of the standard.[36] The decision below conflicts with rulings of this court in three respects: 1) by failing adequately to consider the availability of less onerous alternatives for achieving the state's objectives; *Shapiro* v. *Thompson*, 394 U.S. 618, 631, 633-638; 2) by approving a scheme under which the state protects "the fiscal integrity of its programs" through "invidious distinctions between classes of citizens"; *Graham* v. *Richardson*, 91 S. Ct. 1848, 1853; and 3) by failing adequately to weigh "the interests of those who are disadvantaged by the classification" (*Kramer* v. *Union Free School District*, 395 U.S. 621, 626), namely, indigent students without books.

a) *The treatment of alternatives for satisfying the state's interests*

The district court began its analysis correctly, recognizing by references to alternatives that the availability

[36] In approving the district court's compelling interest analysis, the court below referred specifically only to the legislative desire "to promote education in [certain] fields . . . ." (Slip Op. at 4655-4656.)

of a less onerous alternative for achieving the state's goal must be considered where the compelling interest test applies. (319 F. Supp. at 279.) The district judge erred, however, in giving full consideration to only one alternative, *i.e.*, "grants . . . spread thinly." (*Id.* at 279-280.) Expressing the view that texts for grades 7 to 12 are more costly than those for grades 1-6, Judge Travia stated that the alternative of "grants . . . spread thinly" among all students (grades 1 to 12) could, in view of the cost factor, result in a larger number of students being without books. (*Id.* at 280.) The court concluded that "New York State has a legitimate, compelling interest in seeing to it that as many as possible of its children receive textbooks." (*Id.* at 280.)

Plainly, there were other alternatives for satisfying the three state interests discussed by the courts below. First, apparently without additional expenditures, books could be provided without cost only to those students in grades 1 to 12 from indigent families, a practice similar to one used in the past in New York state.[37] Second, as plaintiffs pointed out in the Court of Appeals, state law could include texts for grades 1-6 in the definition of "ordinary contingent expenses" for which a local district can levy a tax even in the absence of voter approval. (See Plaintiffs' Brief below at 13-14, and see *supra* at 4, n.4.) [38]

[37] Former Section 3209 of the Education Law, repealed by Social Services law Section 131a (Ch. 517, Laws of 1970), required welfare officials to "furnish indigent children with suitable . . . books, to enable them to attend" school. This provision was in effect as early as 1927. (See N.Y. Laws of 1928, Ch. 646, Section 627 F.) Moreover, the New York law to implement *Gideon* v. *Wainwright*, 372 U.S. 335, requires the appointment of counsel for persons "financially unable to obtain counsel. . . ." N.Y. Code of Criminal Procedure, Section 308.

[38] The majority below appears to have suggested that under *James* v. *Valtierra*, 402 U.S. 137, the state's right to involve the electorate in the financing process is unlimited. (Slip Op. at 4659-4660.) However, the inequity here cannot be justified by this rationale. "A citi-

Under each of these alternatives, costs to the state would apparently not be higher, and all students in grades 1 to 12, including those from indigent families, could have texts, the maximum possible impact. And, accordingly, each alternative would also foster development in the particular subjects to which the legislature referred.

It is settled that legislation abridging fundamental interests is invalid if there are such narrower means or less restrictive alternatives for accomplishing governmental purposes. *Kramer* v. *Union Free School District, supra,* 395 U.S. at 632; *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 212-213; *NAACP* v. *Alabama,* 377 U.S. 288, 307-308; *Shelton* v. *Tucker,* 364 U.S. 479, 488; *Shapiro* v. *Thompson, supra,* 394 U.S. at 631. "The breath of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker, supra,* 364 U.S. at 488.

The review of alternatives must be a searching one. *Shapiro* v. *Thompson, supra,* 394 U.S. at 633-8; see also *Carrington* v. *Rash,* 380 U.S. 89, 95-6; *Williams* v. *Illinois,* 399 U.S. 235, 244-5. The incomplete consideration of alternatives demonstrates the wisdom of the Seventh Circuit's decision in *Williams* v. *Page,* —— F.2d —— (1971), the case with which the Court of Appeals decision conflicts, requiring an "evidentiary hearing" on similar claims. Here, in the absence of such a hearing, the alternatives considered in the district court's opinion were those developed by court.

zen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737; *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E.D. La., 1961), *affirmed per curiam* 368 U.S. 515 ("No plebiscite can legalize an unjust discrimination." 197 F. Supp. at 659.)

b) *The "fiscal resources" arguments*

There are three basic flaws in the district court's "fiscal resources" argument, approved by the Court of Appeals. First, we have noted above the availability of options which would apparently not involve additional expenditures, contrary to the assumptions of the district judge.

Second, the district court rejected consideration of any alternative involving increased expenditures. (319 F. Supp. at 279.) However, states have adopted new procedures involving expenditures of funds in response to many decisions of this Court. *Griffin-Douglas* and their progeny and the landmark decision in *Gideon* v. *Wainwright,* 372 U.S. 335, holding that counsel must be furnished to indigent criminal defendants in state proceedings — are obvious examples. Constitutional rights would be hollow if states could avoid implementation simply by pleading that expenditures were required.[39]

Third, the kind of classification involved here cannot be justified by the possibility of increased costs. In *Shapiro* v. *Thompson, supra,* 394 U.S. at 633, this Court stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens. *It could not for example reduce expenditures for education by barring indigent children from its schools.* Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. *The saving of wel-*

[39] See also the discussion *supra* at 28-29.

fare costs cannot justify an otherwise invidious classification. (emphasis added; footnote omitted) [40]

Here, the saving of costs for education cannot "justify an otherwise invidious classification." The courts dictum on education almost precisely covers this situation. While children are not barred from school, they are, on this record, "barred" from an essential tool of an education.[41]

c) *The special interests of the children disadvantaged by the classification*

The governing standards, as we note above, require that great weight be given to the "interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District*, 395 U.S. 621, 626; *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 209-212; *Evans* v. *Cornman*, 398 U.S. 419. Attention to this factor demonstrates that this is an even clearer case for application of the Fourteenth Amendment than *Griffin-Douglas* and their progeny, where the Court assumed only that the interests of the petitioners in the criminal process were the same as more affluent persons. Here, there is a sound basis for arguing that the "interests of those who are disadvantaged" by the challenged classification — children from indigent families in grades 1 to 6 — are stronger than those who have texts, other elementary students and students in grades

[40] The Court followed *Shapiro* during the past term in *Graham* v. *Richardson*, 91 S.Ct. 1848, 1853.

[41] Any reliance by the local defendants on the collection of fees to defray costs would not support a conclusion that the state interest is compelling. "We are thus left to evaluate the states asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin* v. *Illinois*, 351 U.S. 12 (1956)." *Boddie* v. *Connecticut*, 91 S.Ct. 780, 788.

7 to 12. We take this position on the basis of legislation and literature which recognize both the critical importance of early childhood education and the need for special attention to the educational problems of the poor.[42]

First, in 1965, Congress enacted the Elementary and Secondary Education Act, Pub. Law 89-10. Title I of the law (20 U.S.C. 241a-241m) is a comprehensive program for providing federal financial assistance to local school systems with concentrations of children from low income families. The congressional declaration of policy in Section 241a begins by recognizing "the special educational needs of children of low-income families." School systems are required by the law, implementing regulations and other statements of governing criteria promulgated by the Office of Education to concentrate Title I programs in those attendance areas with "high concentrations of children from low income families. . . ." 20 U.S.C. 241 e (a) (1); 45 C.F.R. Part 116, § 116.17(d); United States Office of Education, ESEA Program Guide 44, March 18, 1968, § 1.1.[43]

Second, in April, 1970, Congress amended Title One in Pub. Law 91-230. Section 132 (a) recognizes the importance of projects at the elementary level, requiring, with certain exceptions, that Title One funds be used "in preschool programs and in elementary schools serving areas with

[42] It is proper for the court to consider these materials, *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11; *Skinner* v. *Oklahoma*, 316 U.S. 535, 545, n. 1 (concurring opinion of Stone, C.J.); *Griffin* v. *Illinois*, *supra*, 351 U.S. at 19; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 399; *Mapp* v. *Ohio*, 367 U.S. 643, 651-52, n. 7. Their use here seems particularly appropriate since plaintiffs need only show that their claims are substantial.

[43] The term "educationally deprived children", is defined to include "children who are handicapped or whose needs for . . . special educational assistance result from *poverty*, neglect, delinquency, or cultural or linguistic isolation from the community at large. 45 C.F.R. Part 116, § 116.1 (i) (emphasis supplied.)

the highest concentrations of children from low-income families. . . ."[44]

Third, available expert evidence supports the conclusion of the Congress.[45] It presents the following pertinent propositions: 1) a challenge to earlier notions of genetically determined and fixed intelligence — Hunt (1969, at 191-2); Bloom (1964, at 87-90); Bloom, Davis and Hess (1967, at 12); 2) a suggestion that there is considerable plasticity in intelligence in the pre-school and early elementary years — Bloom (1964, at 87-90; 126-9); 3) and accordingly, a suggestion that early education is critical — Bloom (1965, at 127-8); Bloom, Hess and Davis (1967, at 12, 16, 22); Hunt (1969, preface at VIII). It is noteworthy that both Hunt (1969, at 209) and Bloom, Hess and Davis (1967, at 30) refer to the absence of books in the home as one of the underlying causes of the educational deficiencies exhibited by poor children.

The expert evidence also appears to support plaintiffs' contention that the book distribution procedure will adversely affect poor children "psychologically [and] emotionally. . . ." (App., 15.) Many children from culturally deprived families begin school not having had adequate

[44] The Report of the Senate Committee on Labor and Public Welfare (Senate Report 91-634, 91st Congress, 2d Session) provides the following rationale for the amendment (at 20): "This requirement in part C was adopted by the Committee on the basis of growing evidence which indicates that the early years of education are of paramount importance in a child's development." The Report also states that Title I has focused federal monies "on what may well be the most crucial problem challenging our school systems today: how to educate successfully the children of America's poor." (*Id.* at 7.)

[45] See Benjamin S. Bloom, Allison Davis and Robert Hess, *Compensatory Education for Cultural Deprivation* (Holt, Rinehart and Winston, Inc., 1967) [cited: (Bloom, Davis, Hess, 1967)]; Benjamin S. Bloom, *Stability and Change in Human Characteristics* (John Wiley and Sons, Inc. 1964) [cited: Bloom (1964)]; J. McVicker Hunt, *The Challenge of Incompetence and Poverty*, "Papers on the Role of Early Education" (University of Illinois Press, 1969) [cited: Hunt (1969)].

opportunities for "stimulation, language development, and intellectual development. . . ." (Bloom, Davis, Hess, 1967, at 15). Their experience does not prepare them well for coping with the requirements of public schools. (*Id.* at 21.) This frequently means that "[a]s each year of school goes by, the culturally disadvantaged child suffers further frustration and failure." (*Id.*) It would appear clear that the situation involved in this case would aggravate the problem.

Thus, the particularly vital interests of indigent children in educational opportunities — especially books — during their elementary schooling adds further support to the substantiality of plaintiffs' case. Plainly, it can not be said these children are "substantially less interested" in books than those who receive them. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 212.

5. *The Decision Below Is Not Supported by this Court's Ruling in* Dandridge *v.* Williams, *397 U.S. 471*

The Court of Appeals majority relied heavily on this Court's decision in *Dandridge* v. *Williams,* 397 U.S. 471, in rejecting plaintiffs claims. First, the court read *Dandridge* to establish that the compelling interest standard is inapplicable in the circumstances of this case. (Slip Op. at 4661-4662.) Second, the court below purported to apply the "reasonable basis" standard in accord with its application in *Dandridge.* (Slip Op. at 4656-4658.) *Dandridge* does not sweep so broadly.

First, this case is factually different from *Dandridge* because of the admissions of the local defendants as to the "essential" nature of texts, and the impact of their absence. At a minimum, there is a triable issue as to whether this situation involves, in practical effect, a *total denial* of education. *Dandridge,* in contrast, involved a *dilution* of wel-

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fare benefits. In addition, unlike *Dandridge*, it is admitted that students are divided along lines of wealth, and the Court of Appeals agreed with plaintiffs' contention that this stigmatizes poor students, similarly to racial segregation in the dual system. Compare *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485, n. 17; *Palmer* v. *Thompson*, 91 S. Ct. 1940, 1965-1966 (dissenting opinion of White, J.)[46]

Second, in *Dandridge*, this Court expressed the standard to be applied as follows: "It is enough that the State's action be rationally based *and* free from invidious discrimination." 397 U.S. at 487. (emphasis added.) The court below referred to "limited resources" (Slip Op. at 4658), identified the legislature's goal in the challenged scheme to be the fostering of certain subjects, termed its action "clearly justified in terms of the goals it sought thereby to advance" and concluded that the *Dandridge* standard was satisfied. (Slip Op. at 4658.) It inquired no further.

We submit that this analysis did not satisfy either branch of the *Dandridge* standard. First, each of the courts below referred to state efforts to conserve limited resources. From this viewpoint, the statutory scheme is completely irrational. A millionaire's children in grades 7 to 12 are furnished free texts, hardly a method of conserving resources. Meanwhile, children of the poor in grades 1-6 are denied an essential educational tool. Second, providing books to the children of the affluent in grades 7-12, but denying them to poor children in grades 1-6 does not maximize the impact of state aid, another stated objective. Third, students who must do without texts in the elementary grades will not be helped "in the fields of science, mathematics [and] foreign languages" by having texts in the secondary grades.

[46] While we recognize the importance of the interests involved in *Dandridge*, the wealth classification and the impact on education make this an appropriate situation for application of the compelling interest standard, as we have shown above at 15-22.

There are other state policies which must be weighed in assessing the "rationality" of the legislative scheme. The policy manifested in New York's compulsory school attendance law [Education Law §3205(1)(a)] is not satisfied by having children sit bookless in the classroom. We note also that the legislature's statement of policy, from which the court identified the state's interest here, referred not only to promoting certain subjects, but also stated in part: "The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. *This calls for more adequate educational opportunities and...* (promoting certain subjects) . . . ." (Quoted in Slip Op. at 4658; emphasis added.) Given all of these considerations, we do not believe that the scheme may be termed "rationally based."

It is clearer that the situation is not "free from invidious discrimination." The State requires plaintiffs to attend school. They are without essential books, and therefore, the local defendants admit, have a lesser educational opportunity than students from more affluent families. Further, the court below concedes, they may be stigmatized, similarly, we submit, to black students in the dual system. *Wisconsin* v. *Constantineau*, 91 S.Ct. 507, 510. None of this is due to any "action, conduct or demeanor of theirs . . . ." *Levy* v. *Louisiana*, 391 U.S. 68, 72.[47] And, finally, it would appear that there are alternatives which would both serve the state's interests and avoid these consequences. *Carrington* v. *Rash*, 380 U.S. 89, 95-96; *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349.[48]

[47] See also *Chandler* v. *South Bend Community School Corporation*, C.A. No. 71S 51 (N.D. Ind., Aug. 26, 1971), the district court school fees case discussed above at n. 7; (". . . . Defendant herein has totally failed to present any reason why the plaintiff-students should incur sanctions for their parents' failure to pay school fees." Mem. Op. at 6.)

[48] Consideration of alternatives is proper. *Carrington*, like *Dandridge* written by Mr. Justice Stewart, held violative of the equal protection

If this is not "invidious discrimination," we are quite at a loss to know what is.

6. *The Statutory Scheme Denies Due Process Of Law*

The lower court's conclusion that this case presents no due process issues [49] conflicts with decisions of this Court recognizing that the due process clause does protect against arbitrary government infringment of important individual interests, including education. *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510; *Bolling* v. *Sharpe*, 347 U.S. 497;[50] see also *Williams* v. *Illinois*, 399 U.S. 235, 259-266 (concurring opinion of Harlan, J.) Moreover, despite its view on the due process clause, the lower court expressed agreement with plaintiffs' allegation that poor children might be stigmatized in the operation of the statutory scheme. See *Wisconsin* v. *Constantineau*, 91 S. Ct. 507, 510.

In *Meyer*, this Court reversed the conviction of a teacher under a Nebraska law which forbid the giving of instruction in a language other than English to a student below the ninth grade. The Court stressed the importance of education and noted Nebraska's compulsory attendance law.

clause a Texas Constitutional provision prohibiting a person moving to Texas while a member of the armed forces from voting in any state election while a member of the armed forces. The Court discussed alternatives which the state could employ to satisfy its purported objectives. 380 U.S. at 95-96. The opinion referred neither to the compelling interest standard, nor to a federal constitutional right to vote. It did refer to the importance of voting (380 U.S. at 94, 96), but the same is true as to education. See 16-21 above.

In *Dean Milk* this Court held inconsistent with the commerce clause an ordinance forbidding the sale of milk in Madison unless processed and bottled at an approved plant within five miles of Madison. The ruling was based, in part, upon the apparent availability of "reasonable and adequate alternatives . . . ." (340 U.S. at 354.) We submit that it is more appropriate to evaluate alternatives here where the critical personal interests of indigent students are involved.

[49] Slip Op. at 4661. ("Obviously, though, due process is not involved here.")

[50] See discussion above at 16-21 on the importance of the individual interest in education.

Meyer, supra, 262 U.S. at 400. The ruling rested, in part, on the premise that the law arbitrarily burdened "the opportunities of pupils to acquire knowledge" in violation of the due process clause. 262 U.S. at 401-403.[51]

Mr. Justice Harlan premised his concurrence in *Williams* v. *Illinois*, 399 U.S. 235, 259-266, on the due process clause, terming the issue whether the challenged legislation "arbitrarily infringes a constitutionally protected interest. . . ." 399 U.S. at 259.[52] Applying a standard expressed in his opinion,[53] he concluded that the Illinois procedure was violative of the due process clause.

This case involves a due process violation, given these controlling principles:

First, an important individual interest is significantly burdened. In *Meyer* "the opportunities of pupils to acquire knowledge" were infringed by a rule forbidding the teaching of foreign languages. Here, the burdening of the same interest results from the failure of the state to provide indigents an admittedly essential educational tool. The deprivation is more extreme in this case, extending to all elements of the curriculum in which books are used.

[51] In *Bolling* v. *Sharpe*, 347 U.S. 497, this Court held that operation of a dual school system in the District of Columbia violated the due process clause of the Fifth Amendment. The Court concluded: "Segregation in public education is not reasonably related to any proper governmental objective, thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." 347 U.S. at 500.

[52] The majority held violative of the equal protection clause the Illinois procedure allowing imprisonment of an indigent criminal defendant, in default of payment of a fine, beyond the maximum authorized by the statute regulating the substantive offense. *Wililams*, *supra*, 399 U.S. at 241.

[53] ". . . the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen." *Williams*, *supra*, 399 U.S. at 260 (concurring opinion).

Second, there are significant questions about "the rationality of the connection between legislative means and purpose. . . ." *Williams* v. *Illinois, supra*, 399 U.S. at 260 (concurring opinion). Providing books to children of affluent families in grades 7-12 and denying them to poor children in grades 1-6 is a wholly irrational method of furthering the purported state interests of conserving resources and maximizing the impact of state aid. Further, New York's purpose can not be understood only by considering the laws immediately involved in this case. The denial of texts to children is entirely inconsistent with the policy manifested by the state's compulsory attendance law. [N.Y. Education Law § 3205 (1)(a).] Surely, the state interest reflected in § 3205 (1)(a) is not satisfied by having students sit bookless in the classroom.

Third, there is an asserted state interest in promoting development in certain subjects taught at the secondary level. We submit, however, that it is not such as to outweigh the impact of the challenged scheme on the critical interests of the plaintiffs [*Williams* v. *Illinois, supra*, 399 U.S. at 262-263 (concurring opinion)],[54] particularly in view of the apparent "existence of alternative means for effectuating the [state's] purpose[s] . . . ." *Williams*, supra, 399 U.S. at 260 (concurring opinion).[55]

Fourth, a student's interest in an education is a personal one. *Meyer*, supra, 262 U.S. at 401; accordingly, it is patently arbitrary for that interest to be burdened due to a circumstance over which the child has no control, the indigency of his family. See *Levy* v. *Louisiana*, 391 U.S. 68, 72;[56]

[51] One commentary notes about *Meyer:* "The individual's interest in education is personal and important, important enough to subdue the arguably rational purpose of the state to democratize its children and thus to avoid the divisions of sect and creed." Coons, Clune and Sugarman, *supra* n. 15, at 376.

[55] See discussion of alternatives *supra* at 30-32.

[56] *Levy* was decided on equal protection grounds and we cite it above in support of our argument based on that clause. However,

Robinson v. *California*, 370 U.S. 660, 667 and n. 9; *Boddie* v. *Connecticut*, 91 S. Ct. 780, 788.[57]

Fifth, our due process contention is buttressed by the acknowledged stigmatization. *Wisconsin* v. *Constantineau*, 91 S.Ct. 507, 510. As Judge Kaufman stated in dissent below (Slip Op. at 4670):

> The psychological and social impact of the badge of inferiority implied by their disfavored treatment must extend far beyond the classrooms . . . . The enduring lesson they are thus taught in the public schools they attend without books is that wealth breeds favored treatment while disadvantage leads on to still greater handicaps.

This stigmatization is much more than simply the reflection of private inequality; it is directly attributable to the operation and interaction of the state's education laws in the schools which poor children are required by state law to attend. And unlike *Constantineau*, there is not even a claim of any attempted remedial benefit to those stigmatized.

C. Alternatively, the Court of Appeals Decided Important Questions of Federal Law which Have Not Been but Should Be Settled by this Court

We argue throughout that the court below decided federal questions "in a way in conflict with applicable decisions

"the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

[57] See also *Chandler* v. *South Bend Community School Corporation*, No. 71 S 51 (N.D. Ind., Aug. 26, 1971) ["The school fee collection procedure as applied to these minor plaintiffs, conditions *their personal* right to an education upon the vagaries of their parent's conduct, an intolerable practice condemned by this Court in *Carpenter, et al.* v. *Arnold*, 70 S 54 (1970)." [Mem. Op. at 6.]

of this court; . . . ." [Supreme Court Rule 19(1) (b).] However, this case can be viewed as presenting new questions. Accordingly, in the alternative, we submit that the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this court; . . ." (*Id.*) The fees at issue here present an important question just as the ones involving the criminal process, voting and divorce litigation did in *Griffin* and its progeny, *Harper* and *Boddie*.

Conclusion

For the reasons expressed in this brief and in the petition, this Court should agree to review the decision of the Court of Appeals for the Second Circuit in this case.

By: J. Harold Flannery
Robert Pressman
Paul R. Dimond
Jeffrey Kobrick
Center for Law and Education,
Harvard University

The United Ministries
in Public Education

November, 1971

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH DISTRICT

June 9, 1971
WILLIAMS, ET AL.
v.
PAGE, ET AL.
No. 18536

cert. denied,
40 U.S. Law
Week 3288,
(Dec. 21, 1971)

Appeal from the United States District Court
for the Northern District of Illinois
Before: Swygert, Ch. J.; Kiley, C.J., Fairchild, C.J.

O R D E R

This action for declaratory and injunctive relief and damages was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and jurisdiction was claimed under 28 U.S.C. §§ 1343, 2201, 2202, 2281, 2282 and 2284. Upon motion of the defendants and after receiving briefs of the parties, the district court dismissed the complaint and the cause for failure to state a claim upon which relief could be granted.

The complaint alleges that graduation participation is an essential part of a child's education and the complaint may be construed as claiming that in the schools concerned the activities for which the fees are required have been recognized by the school administrators, teachers, parents and students as integral parts of the school experience, from which indigent children are being excluded. Until these and related factual questions are explored at an evidentiary hearing, the precise contours of the constitutional rights which plaintiffs claim were violated are not readily discernible.

As Professor Moore has stated the rule, "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" 2A J. Moore, Federal Practice ¶ 12.08, at 2271-74 (2d ed. 1968). This is especially true in actions brought under 42 U.S. § 1983. *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 857 (2d Cir. 1970). Applying that standard to the instant complaint, the complaint should not have been dismissed without receiving evidence. The judgment of the district court is reversed and the cause remanded for further proceedings.

HARVARD UNIVERSITY
CENTER FOR LAW AND EDUCATION

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TO: Legal Services Offices

FROM: Center for Law and Education

RE: Memorandum of Law for Challenges to School Fees

The following legal memorandum was written for a particular case in Elma, Washington, by Steve Randels, Seattle Legal Services, and Patricia Lines and Robert Pressman, Center for Law and Education. It has "modular" components--separable sections. Now that the Elma case is settled, the facts can be rewritten, and all or part of the same brief is being reused in another similar Washington case. Some sections might also be incorporated into briefs in other states. Thus, headings are not numbered. Discussion which focuses specifically on Washington law and factual and legal discussions all begin on new pages, and can be deleted or rearranged. This approach was adopted to aid legal services offices suffering from a shortage of secretaries.

Section I, which is not included in this "modular brief," would be a statement of facts. In Elma, the fees charged to students ranged from $15 to $25, and covered items such as magazines, student activities and towel service. Students were harassed and sometimes received failing grades for failure to pay the fees. The fees were established by the local school board, and not by the state legislature.

Section II argues that the fees policy violates the state constitution. Since the Washington State Constitution does not provide for "free" schools, Part A argues that a provision for a system of "common schools" requires free schools.* Part B argues that a free school requirement precludes even the smallest fees. Adverse cases allowing charges are not cited in the brief. See, e.g., Vincent v. County Board of Education, 222 Ala. 216, 131 So. 893 (1931); Roberts v. Bright, 222 Ala. 677, 133 So. 907 (1931); Bryant v. Whisehart, 167 Ala. 325, 52 So. 525 (1910).

Since an early attorney general's opinion seems to exclude high schools from the definition of common schools in Washington,

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* Even in the absence of an express constitutional provision prescribing a system of public or common schools, state courts might be found to require that such schools be free once they are organized. Dicta in Massachusetts, for example, defines public schools as those ". . . which are open and free to all the children and youth of the town in which they are situated, who are of proper age or qualifications to attend them . . . ." Jenkins v. Andover, 103 Mass. 94, 99 (1869) (emphasis added).

reliance is also placed on an ultra vires argument (Section III). This is a somewhat old-fashioned argument--predating the New Deal and an era when courts were regularly striking down legislation simply because it was "unreasonable." Where the state constitutional argument is strong, Section III could well be omitted.

Section IV presents the case for a violation of the federal constitution's equal protection clause because it discriminates against the poor. Only cursory reference is made here to the adverse Supreme Court dicta in Dandridge v. Williams, 397 U.S. 471 (1970) and James v. Valtierra, 402 U.S. 137 (1971), relating to the standard of review. If it comes up, Dandridge might be distinguished on the grounds that it is not an education case. It should also be classified as a case which does not involve a fundamental right (welfare payments) or a suspect classification (family size), and hence is not a case requiring "active review." See Brief, Section IV.

James v. Valtierra makes major inroads on the argument appearing in Part IV(c)(1), which maintains that economic classifications should be treated like racial classifications. In James, the Court upheld a California state constitutional provision which required that low-rent housing projects be approved by a majority vote in a referendum in the community where the project would be located. The Court distinguished its earlier decision in Hunter v. Erickson, 393 U.S. 385 (1969), where it struck down a city charter provision which had required a similar referendum before the city could adopt open housing ordinances. The Court in James also observed that the record did not support a claim that the California law in fact discriminated against a racial minority.

The Court found the California law justified in that it gave the citizens of a community a "voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." Justices Marshall, Brennan and Blackmun dissented on grounds that the referendum requirement violated the equal protection rights of the poor. Justice Douglas abstained.

This case makes it fairly clear that a majority on the Supreme Court will require the "far heavier burden of justification" only for racial classifications, and not for other classifications, even economic classifications.

James should be distinguished on the ground that education is more important than low-rent public housing. This must be considered together with the fact that economic classifications are more onerous than the kinds of classifications to which courts apply the traditional equal protection test (military status, residency, etc.). Therefore, the two factors together require the same degree of justification as would be required in cases involving only fundamental rights or only racial classifications. See Note, Equal Protection, 82 Harv. L. Rev. 1067 (1969). Essentially, the courts seem to be balancing the equities. The nature of classification as well as the nature of the right which is in jeopardy are

both factors which must be considered when valuing the relative importance of the citizen's interest and the competing interest of the state.

Secondly, James should be distinguished on the ground, that the countervailing state interest--preserving democratic decision-making--is vastly more important than any countervailing state interest which could be forwarded to justify school fees or excluding children from school for inability to pay such fees. See Johnson brief at 22, n. 24.

Superficially, James seems to go even further and deny equal protection to any groupings save racial. This is a misreading. First, the Court would not overrule the lines of non-racial equal protection cases so obliquely. Second, the Court has more recently observed, in Townsend v. Swank, 92 S. Ct. 502, ____ n. 8 (1971), that:

> . . . a classification which channels one class of people, poor people, into a particular class of low paying, low status jobs would plainly raise substantial questions under the Equal Protection Clause.

If damages are claimed, authority may be found in Bond v. Public Schools of Ann Arbor School District, 383 Mich. 293, 178 N.W. 2d 484 (1970) and Op. of the Att'y General of Wyo., 1971 Op. no. 4 (June 11, 1971). In both, the existence of a previous decision by the attorney general of the state was deemed necessary to put the school district on notice that it should not charge fees.

The Center will be happy to review and comment on briefs if given at least one week to do so.

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THE FEES POLICY VIOLATES THE STATE CONSTITUTION

A. The Constitution and Laws of the State of Washington Provide for a a System of Public Schools to be Maintained at Public Expense and Free of Charge.

In a compact with the United States, entered into when admitted to the Union, the State of Washington promised to guarantee certain fundamental rights to its citizens. One of these guarantees was for "the establishment and maintenance of systems of public schools . . . which shall be open to all . . . ." Wash. Cons. art. XXVI (1889). The framers of the Washington Constitution made further provision for public education in Article IX which reads in part:

> 1. Preamble. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex.
>
> 2. Public School System. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools and such high schools, normal schools and technical schools as may hereafter be established.

As required by the Constitution, the legislature has provided for a system of public schools in this state. It has also defined public schools as follows (R.C.W. 28A.01.055):

> Public schools shall mean the common schools as referred to in Article IX of the state Constitution and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense.

As defined in R.C.W. 28A.01.060(emphasis added):

> "Common schools" means schools maintained at public expense in every school district and carrying on a program from kindergarten through the twelfth grade or any part thereof including vocational educational courses otherwise permitted by law.

In an early case, the Washington Supreme Court found a model training school which was selective in admitting students was not a "common school" and therefore was not entitled to funds from the common school fund. The court defined "common school" to mean one which is free and open to all. School District No. 20 v. Bryan, 51 Wash. 498, 502-504, 99 P. 28 (1909) (emphasis added):

> The words "common school" cannot be arbitrarily defined, but must be considered in connection with the general scheme of education outlined in the Constitution of the State. . . . /A/mple provision for the education of children was made paramount, and the duty was imposed upon the Legislature of providing a general and uniform system of public schools. . . . The system must be uniform in that every child shall have the same advantages and be subject to the same discipline as every other child . . . .
>
> . . . To summarize, a common school, within the meaning of our Constitution, is one that is common to all children of proper age and capacity, free and subject to and under the control of qualified voters of the school district.

See also the dicta in a later case, Lichtman v. Shannon, 90 Wash. 186, 190-191, 155 P. 783 (1916):

> . . . Public schools are usually defined as schools . . . maintained at public expense by taxation and open without charge to the children of all residents of the town or district.

The constitutional mandate and these judicial interpretations require that public schools in Washington be free and open to all. This precludes conditioning the benefits of public education upon payment of a fee. To hold otherwise would require parents of school age children to finance schools from private resources when the Constitution and laws of this

state require that they be maintained at public expense. To hold otherwise would also deny to children of parents who are unable to pay the fees access to the public schools as guaranteed to them in the Washington State Constitution.

Since this is the first fees case in this state, more specific authority from other states is also relevant. Kansas has a constitutional provision similar to that contained in the Constitution of this state (Kan. Const. art., Sec. 2):

> The Legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools. . . .

The Kansas Supreme Court struck down a statute permitting a school system to require pupils attending high school to pay a fee of $2.50 to help meet expenses. Before deciding whether this constitutional mandate referred to "a system of free common schools or pay common schools," the Court thoroughly examined and analyzed relevant law and legal history. Board of Education v. Dick, 70 Kan. 434, 438, 78 P. 812, 813-14 (1904). The court observed that

> The phrase "common schools" is synonymous with public schools." . . . "Common or public schools are, as a general rule, schools supported by general taxation, open to all of suitable age and attainments, free of expense, and under the control of agents appointed by the voters."

The court then consulted numerous law dictioneries, all of which defined common schools as "free" or "gratuitous" and concluded (Ibid.):

> We think it follows, therefore, both from authority and reason, that the phrase "common schools" was used in the Constitution in its technical sense, which means free schools, and that the common schools of Kansas are free schools.

In Special School District No. 65 v. Bangs, 144 Ark. 34, 221 S.W. 1060 (1920), the Supreme Court of Arkansas struck down tuition charges assessed against high school students. School officials argued that the district was not required to establish high schools, and therefore, constitutional provisions did not apply. The court ruled to the contrary. Once high schools were established, they became "common schools"

as contemplated by the State Constitution and had to be free of charge. See also, e.g., Dowell v. School District No. 1, 220 Ark. 828, 250 S.W. 2d 127, 129-30 (1952); Mariadahl Children's Home v. Bellegarch School District No. 23, 163 Kan. 49, 180 P. 2d 612 (1947); Moore v. Brinson, 170 Ga. 680, 154 S.E. 141 (1930); Claxton v. Stanford, 160 Ga. 573, 128 S.E. 887 (1925); Board of Education v. Corey, 63 Okla. 178, 163 P. 949, 953 (1917); Irvin v. Gregory, 86 Ga. 605, 13 S.E. 120 (1891). These cases hold that wherever a constitution requires "common" "public" or "free" schools, it is unlawful to charge tuition of any kind.

To conclude, the constitution of this state requires the public schools to be free of charge to the students eligible to attend them.

B. The Constitutional Requirement for Free Public Schools Precludes Conditioning Full Participation in a Course or an Essential School Activity on Payment of a Fee.

Although it is clear from the above text the State Constitution mandates that public schools be "free," there still seems to be a question of "how free?" According to school officials, small charges for a few limited and specific goods or services are permissible. We maintain otherwise. The question is, then, "What is free?" Webster's International Dictionary (2nd Ed., at 1003) defines "free" to mean "given or furnished without cost or payment; gratuitous; or, free admission." This definition of "free" should make it clear that even the smallest charge is illegal.

The relevant cases from other states indicate that a fees charge need not be a full tuition charge to contravene a requirement that public schools be free. Even the smallest charge to defray the cost of the academic program -- teaching, facilities and textbooks -- have been deemed as invalid as a full assessment for tuition. On the other hand, it seems reasonable for school officials to charge admission for attendance at a school concert or athletic event. However, even this may be invalid if attendance is required or punitive action is taken against the non-paying student. Thus, the Supreme Court of Idaho struck down a variety of academic and non-academic fees where the sanction for non-payment was the withholding of the student's transcript. Paulson v. Minidoka County School District No. 331, 93 Idaho 469, 463 P. 2d 935 (1970). The Idaho Constitution provided for a "system of public, free common schools." The school fees were essentially the same as those in

in the case at bar. The Minidoka School District had charged each student attending high school:

School District Fees	$ 2.50
Textbook Fees	10.00
Activity Ticket	3.50
Student Council Fee	1.00
Newspaper	1.00
Annual (Yearbook)	5.60
Cap and Gown Fee	1.00
Class Fee	.40
	$ 25.00

In subsequent years, the fees remained the same, but were itemized only as "Textbook Fees" ($12.50) and "School Activities Fees" ($12.50). All of these, even the fees for so-called "extra-curricular activities," were struck down (93 Idaho at 472, 463 P. 2d. at 938):

> A levy for such purposes, imposed generally on all students whether they participate in the extra-curricular activities or not, becomes a charge on attendance at school. Such a charge contravenes the constitutional mandate that the school be free.

Under the test applied by the court, a fee would be invalid if it was prerequisite to participation in school, or any "necessary element of any school activity." Ibid.

This test was applied again in Bond v. Public Schools of Ann Arbor School District, 383 Mich. 693, 178 N.W. 2d 484 (1970). Parents sued to declare certain fees unconstitutional and to recover fees paid. They did not allege that any student was penalized for failure to pay. The trial court had found in favor of the plaintiffs as to general fees, interscholastic athletic fees, and materials tickets (the latter being charged for specialized courses such as photography, art, home economics and industrial arts). However, it had erroneously upheld the requirement

Nor does it matter how small the fee charge is. If such charges are prohibited by a state's constitution, then a charge of $1.00 would be as invalid as a charge for full tuition. To hold otherwise would be opening the door to a limitless number of future increases in the charge. This spectre swayed the court in Young v. Trustees of Fountain Inn Graded School, 64 S.C. 131, 41 S.E. 824 (1902). Plaintiffs sought an injunction against a $2.00 fee required for attendance at a local grade school. The fee was to cover incidental expenses including heating and equipment costs. Pupils were to be suspended for non-payment. By statute, the state had instituted a system of free schools. The court granted the injunction (64 S.C. at 136, 41 S.E. at 826):

> If the trustees have the right, under the act of 1896, to charge an incidental fee of $2.00 from each scholar, they have the right to increase it to $10.00 per scholar. In other words, if the right exists, there is no limit in said act of 1896 to such power of trustees.

In State ex rel. Little v. Regents of the University of Kansas, 55 Kan. 389, 40 P. 656 (1895), the issue involved an annual library fee of $5.00 and a graduation fee of $5.00, with exclusion or suspension the penalty for non-payment. The laws of Kansas required that admission to the university was to be free to state residents. The court concluded that even incidental fees were illegal (55 Kan. at 399, 40 P. at 658):

> If the regents may collect five dollars for the use of the library, why may they not collect also for the use of the rooms of the building and the furniture? Why may they not impose fees for walking in the campus, or for the payments of instructors? All these things have cost money. . . . If they collect for one thing, it is not apparent why they may not collect for another.

Allowing even the smallest fee to stand is a dangerous precedent. In the face of an unqualified constitutional guarantee for public schools, there can be no such compromises.

that children purchase textbooks, miscellaneous supplies and equipment and had refused to permit recovery for payment of the general fees. 18 Mich. App. 506, 171 N.W. 2d 557 (1969). On appeal, the Supreme Court of Michigan found in favor of the plaintiffs on these issues. The Court expressly adopted the reasoning of the Idaho Court in the Paulson case. They also found it invalid to distinguish between tuition charges and charges for materials (383 Mich. at 702 , 178 N.W. 2d. at 488):

> Applying either the "necessary elements of any school's activity" test or the "integral fundamental part of the elementary or secondary education" test, it is clear that books and school supplies are an essential part of a system of free public elementary and secondary schools.

It should be noted that no child was barred from the Ann Arbor Schools because of his inability to pay. 18 Mich. App. 506, 171 N.W. 2d. 557, 560. The issue concerned whether students who were "financially able" could be compelled to pay fees including those charged for textbooks and miscellaneous supplies.

In Wyoming, where the state constitution requires a system of "free" elementary schools, the attorney general has ruled that no fees may be charged for any "necessary element" of a pupil's education in high school. The attorney general reasoned that once high schools were created, they became part of the same system, and had to be free. The ruling extended to cover all fees relating to the curriculum, or courses at a school. Extra-curricular fees were not covered, except that the opinion noted that the school district participation in extra-curricular activities should be free to those who could not afford to pay fees. Opinion of the Attorney General of Wyoming, 1971 Op. no. 4, June 11, 1971.

THE FEES POLICY IS INVALID BECAUSE IT EXCEEDS THE STATUTORY AUTHORITY OF THE SCHOOL BOARD

A. Charging School Fees Exceeds the Statutory Power of the Board.

School Boards do not have unlimited power and authority. Like any municipal corporation, the Board has only as much authority as it has received from the legislature by statute. An action which is not specifically authorized by statute, and cannot be fairly implied from specific statutory authority is ultra vires.[1] See, e.g., Board of Directors of the Independent School District of Waterloo, Ia. v. Green, 259 Ia. 126, 147 N.W. 2d 854 (1967); Coggins v. Board of Education of City of Durham, 233 N.C. 763, 28 S.E. 2d 527 (1944); Gustafson v. Wethersfield Township High School District 191, 319 Ill. App. 255, 49 N.E. 2d 311 (1943); Seattle High School v. Sharples, 159 Wash. 424, 298 P. 974 (1930); Rhea v. Board of Education of Devils Lake, 41 N.D. 449, 171 N.W. 103 (1919); Matthews v. Board of Education of School District No. 1, 127 Mich. 530, 86 N.W. 1036 (1901); cf., Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1340, 1345 n. 1 (S.D. Tex. 1969). Under

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1. This doctrine should not be confused with federal or state constitutional limitations on school authorities. A school rule which is permissible under the Constitution may still be invalid because the legislature has not delegated the power to school officials to pass the rule. Compare Waugh v. Board of Trustees of the University of Mississippi, 237 U.S. 589 (1915), and Hughes v. Caddo Parish School Board, 57 F. Supp. 508 (W.D. La. 1945), affirmed 323 U.S. 685 (1945), with Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43 (1922). Of course, if the legislature authorizes an act, it must comply with constitutional standards.

this doctrine, the Courts will invalidate acts which are arbitrary and unreasonable, or otherwise exceed its authority as delegated by the legislature.[2]

2. For example, the courts have forbidden school officials from requiring a child to perform chores (State v. Board of Education of the City of Fond du Lac, 63 Wis. 234, 23 N.W. 102 (1885)) and requiring school patrols. Re Student Patrols, Att. Gen. Op., 11 Pa. Dist. and County Rep. 660 (1929). Other acts deemed to be ultra vires have included restrictions on students' social activities (Dritt v. Snodgrass, 66 Mo. 286, 27 Am. R. 343 (1877) (dicta); State v. Osborn, 32 Mo. Op. 536 (1888)), unless the restriction was confined to that which would be necessary to assure performance of studies. Magnum v. Keith, 147 Ga. 603, 95 S.E. 1 (1918).

In Washington, the Supreme Court has fully recognized the ultra vires rule (Seattle High School v. Sharples, 159 Wash. 424, 428, 298 P. 974, 995 (1930)):

> . . . as the school district is a municipal corporation created by the legislature, it, acting through its board of directors, can exercise only such powers as the legislature has granted in express words, or those necessarily or fairly implied in or incident to powers expressly granted, or those essential to the declared objects and purposes of the municipal corporation.

When applied to the facts in the instant case, this rule requires that the assessment of fees or other charges must be expressly authorized by statute, or, at least, it must be necessary to the accomplishment of some duty or implied under some power which the state has expressly granted to the school board. A review of relevant Washington statutes reveals no specific authority to charge students compulsory fees in public schools. In fact, tuition charges are expressly prohibited. R.C.W. 28A.58.230. Therefore, the court must decide whether the power to charge incidental fees may be implied from the general grants of authority contained in R.C.W. 28A.58.010:

> A school district . . . shall possess all the usual powers of a public corporation, and . . . may . . . transact all business necessary for maintaining school (sic).

Alternatively, the power could be viewed as an incident of the specific authority to furnish and maintain school buildings (R.C.W. 28A.58.102) or to operate libraries (R.C.W. 28A.58.104). This seems doubtful, however, since the Washington legislature has omitted to grant school officials specific authority to charge fees in public schools, while

it has granted such authority to officials of educational institutions in many other situations. For example, tuition and incidental fees associated with state universities and community colleges are provided for with great particularity. See, e.g., R.C.W. 28B.15.100, and 28B.15.500. R.C.W. 28A.34.010 permits the charging of fees for nursery schools established in connection with common schools. R.C.W. 28A.70.110 authorizes the payment of teacher certificate fees. Nonresident children and adults may be charged tuition unless other arrangements can be made (R.C.W. 28A.58.240). Moreover, those sections of the code which detail methods of raising revenue for schools appear to limit a school's revenue raising activities to public taxation. See R.C.W. 28A.01.060; and see generally R.C.W. 28A.40 through 28A.56.

In sum, the power to charge fees for materials or service, while apparently precluded in the context of the common schools, is specifically granted in other contexts. Moreover, the machinery for raising revenue is outlined in detail, and appears to restrict school boards to public taxation as a source of revenue. The express mention of one thing in a statute can imply the exclusion of another. Bradley v. Department of Labor and Industries, 52 Wash. 2d 780, 329 P. 2d 196 (1958); Washington Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County, 77 Wash. 2d 90; 459 P. 2d 633 (1969). This would bar a finding that the power to charge fees, though not specifically provided for, would exist by implication from other general grants of authority.

Finally, in a recent opinion the Attorney General for the State of Washington found that a school district did not have the authority to charge either a general tuition fee or a special tuition fee for certain courses. A.G.O. 65-66 No. 113. He also concluded that the district cannot require students to purchase books, supplies and instructional materials from the district where the same were not supplied free of charge. Ibid. pp. 3-6. See also A.G.O. No. 51-53-494, where the Attorney General ruled against fees for materials:

> Where a school district does not have sufficient funds to pay for the cost of instructional materials, may such school district levy and collect a fee of $3.00 per pupil to be used to partially offset the cost of instruction materials, including but not being limited to art paper, penmanship paper, chart paper, tagboard, paints, ink, modeling clay, yarn, paper fasteners, pins and other similar items?

In neither opinion did the Attorney General rule on the board's duty to supply these materials, but this is not the question raised in the instant case either.

In the absence of an express statutory authorization, the courts in other states have refused to imply authority to charge fees, and have usually found fee assessments to be ultra vires. Compare Young v. Trustees of Fountain Inn Graded School, 64 S.C. 131, 41 S.E. 824 (1902) with Felder v. Johnston, 127 S.C. 215, 121 S.E. 54 (1924). In Young, the court struck down a school board's attempt to require students to pay an incidental fee. In reviewing various sections of the statute in question, the court rejected the conclusion that charging fees was essential or incidental to the various other powers specifically conveyed (64 S.C. at 138-39, 41 S.E. at 827):

> . . . Surely the legislature could not have more pointedly fixed the specific duties of a board of trustees of a school district than is here done . . . We honor the motives of this body of public-spirited citizens in their effort to advance the education of the children . . . but we dare not add to the law.

In Felder the court upheld a similar action since the legislature had passed a specific law allowing school districts to make the assessments.

See also Morris v. Vandiver, 164 Miss. 476, 145 So. 228 (1933). The Supreme Court of Mississippi examined relevant statutes to find where the school board at an agricultural high school might have received authority to charge $13 in fees to cover costs of an athletic program, literary events, library privileges, public speaker, orchestra and band and entertainment at assemblies. It found no specific authorization, and it held that the general powers of the Board to maintain discipline or do that which is necessary for the business management of the schools could not be extended to provide authority for such charges (164 Miss. at 493, 145 So. at 233):

. . . We do not think the power broad enough to authorize the board to impose charges not specifically authorized by law, and to enforce payment by refusing permission to attend the school where students are eligible to attend.

B. Taking Punitive Action Against a Child Because He Does Not Pay Compulsory School Fees Exceeds the Powers Delegated School Boards.

Even if the board had authority to charge fees, it is doubtful that school officials may punish children for failure to pay the assessment, in the absence of specific statutory authorization. Although school boards have indisputable power to adopt appropriate and reasonable disciplinary rules and procedures, there are limits on the exercise of this authority. Excessive punishment can be deemed ultra vires, even if a school rule was itself valid.[3] In other words, even if it were appropriate for a board to require students to make some payment for some service, it would be inappropriate to punish non-payment by expulsion, denial of access to a course, failing or poorer grades, withholding a transcript or by similar injury to the child's academic privileges.

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3. For example, in Iowa the Supreme Court decided that a school board could not withhold a student's diploma because she had refused to wear a cap and gown at a commencement exercise. The Court noted that the board might have excluded the student from the exercise, but struck down the actual punishment imposed because it was excessive and beyond the scope of the board's authority. The Court said (Valentine v. Independent School District, 191 Ia. 1100, 1104-05, 183 N.W. 434, 436-437 (1921);

> ". . . we hold that such rule is unreasonable and a nullity as a condition precedent to receive the honors of graduation and a diploma. The wearing of a cap and gown on commencement night has no relation to educational values, the discipline of the school, scholastic grades, or intellectual advancement.

See also Perkins v. Independent School District of West Des Moines, 56 Ia. 474, 9 N.W. 346 (1880); State v. Vanderbilt, 116 Ind. 14, 18 N.E., 267-68 (1888).

This was the reasoning of the Attorney General for the State of Washington, who advised against excessive punishments for a child who lost a book from the school library. A school district wished to require reimbursement for the lost book, which it could legally do, but it also wished to punish the child who failed to make up the loss by refusing to transmit his transcript on his transfer to another public school. The attorney general ruled (AGO 61-62, No. 48):

> It is our opinion that if the board of directors of a school district were to adopt a rule or regulation under which it would refuse to transmit a student's credits to a school to which the student has transferred until fees for lost books were paid, the rule would be struck down by the courts as being arbitrary and capricious if the same were ever tested.
>
> Furthermore, if such rule and regulation were adopted and a student was prevented from enrolling in a proper class in the district to which he transferred, the rule, under certain circumstances would conflict with our compulsory education law (chapter 28.27 RCW) and with the statutory right of every child between the ages of six and twenty-one years to attend the public schools in the district in which he resides.

In another opinion, the Washington Attorney General ruled that a student's diploma could not be withheld because of an unsatisfied claim for damaged or unreturned books (quoted in AGO 61-62, No. 48, p. 3):

> . . . we see no grounds that would reasonably justify a school board in imposing such a severe penalty . . . the withholding of a certificate of graduation. It would be an injustice to the student to put into effect such drastic rules.
>
> The policy of the state and the paramount object of our educational system is to keep the boys and girls in school and not to drive them out by harsh rules for such a trivial offense as losing a book or two.

THE FEES POLICY VIOLATES THE UNITED STATES CONSTITUTION BY DENYING EQUAL PROTECTION TO CHILDREN OF THE POOR

The Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Literally interpreted, this provision prohibits any unequal treatment of school children. However, the courts traditionally have allowed differential treatment of persons where it is reasonably related to the legitimate purpose contained in the law or regulation creating the differential treatment (the "reasonable relation" test).[4] This test does not apply where a fundamental right is in jeopardy or when the classification of those receiving differential treatment is suspect. When either of these factors exist, than a stricter test applies. In these more difficult situations the courts will subject the classification to strict scrutiny, and will require a compelling state interest or purpose (the "compelling interest and higher relevance" test).[5]

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4. Cases where the Court has applies the "reasonable relation" test include Rinaldi v. Yeager, 384 U.S. 305 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Morey v. Dowd, 354 U.S. 457 (1957); F.S.Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Gulf, Colorado & Western Ky. v. Ellis, 165 U.S. 150 (1897); See Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 346 (1949).

5. Cases where the Court has required a compelling state interest include Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virgonia State Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Brown v. Board of Education 347 U.S. 483 (1954); see, also, Chandler v. South Bend Community School Corp., cir. no. 71 S 51, N.D. Ind., Aug. 26, 1971.

In other words, depending on the nature of the interest which is threatened by the classification, the courts will apply a different standard of review. In an ordinary case - where no important right is in jeopardy and the classification is not "suspect" -- the court applies what has been described as "restrained review." In other cases, such as the instant case, the court applies "active review" and requires officials to justify their action by showing that an overiding and compelling state interest is at stake. Dunham v. Pulsifer, 312 F. Supp. 411, 415-417 (D. Vt. 1970); Note, Equal Protection, 82 Harv. L. Rev. 1067 (1969). Before proceeding further, therefore, this court must decide whether to apply "restrained" or "active" review to the case at bar. As will be shown, the stricter standard must be used because children have a fundamental right to education, and because economic status (poor and nonpoor) is a suspect classification. However, as discussed in the next section even under the less stringent traditional standard, the fees policy is invalid.

A. The Fees Policy Singles Out Children of the Very Poor For Discriminatory Treatment

Children of the very poor are among those who cannot afford the necessary fees. Particularly for those whose only source of income is welfare payments, extra funds are wholly unavailable, since the state has calculated the amount of the welfare check to cover only vital necessities. Because of the facts of life, the fees policy effectively creates two classes of citizens: (1) indigents who are unable to pay the charges and (2) all others, who are fully able to pay. Those who do not pay are granted fewer opportunities and privileges, and are subjected to humiliating treatment. Thus, the fees policy of the school officials in the instant case prevent the very poor from obtaining the full educational services and benefits made available to other children. Williams v. Page, no. 18536, 7th Cir., June 9, 1971 (holding a cause of action exists where complaint alleges fees policy excludes indigent children from integral parts of school experience); Chandler v. South Bend Community School Corp., cir. no. 71 S 51, N.D. Ind., August 26, 1971 (invalidating fees policy in South Bend). Cf., Griffin v. Illinois, 351 U.S. 12, 17-18 (1956).

It might be argued that the policy "should be upheld since . . . it applies to rich and poor alike. But [facially] non-discriminatory [provisions] may be grossly discriminatory in [their] operation' Id. at 17, n. 11, cf. Guinn v. United States 238 U.S. 347 (1915) and Lane v. Wilson, 307 U.S. 268 (1939).

B. Under the Traditional Test, the Fees Policy is Invalid Since There Is No Reasonable Relation Between the Denial of Equal Benefits to The Children of the Poor and The Purpose Behind the Fees Regulation.

Nearly all laws create classifications, but not all classifications are unconstitutional, the "traditional" standard by means of which courts have determined which classifications violate the Equal Protection clause is as follows (F.S.Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920):

> . . . the classification must . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

This test will frequently be applied to the administrative actions of school officials, See Dunham v. Pulsifer, 312 F. Supp. at 416:

> The traditional equal protection test looks simply to the reasonableness of the regulatory scheme in light of its possible intended purposes. Under this test a classification is valid if it is not arbitrary and has a reasonable connection with some permissible legislative or administrative purpose.

In such a case the court exercises "restrained review."[6] This rule requires an analysis of the relation between the purpose of the regulation and the means of achieving it. Thus, barring long-haired males from athletics was adjudged to be an invalid classification, since there was no showing that long hair affected athletic performance

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6. See cases cited note 4 Supra.

team spirit or discipline. Dunham v. Pulsifer, 312 F. Supp. at 419.[7]

The primary purpose of the fees policy is to raise funds to provide extra educational services and materials to children. Denying educational services and benefits to any child is plainly self-defeating. However, under the traditional test, if the primary purpose is impermissible, the Court will attribute a second purpose to the policy, if possible.[8]

In the case at bar another purpose could conceivably be inferred: the fees policy was designed to conserve public funds. The fee charges shift part of the cost of education to parents whose children

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7. The court held that "even under the traditional restrained standard the evidence fails to show a link of reasonableness between the code and the furtherance of some permissible objective of the athletic program." Ibid. Additional examples of invalid classifications under this test are legion. For example, the United States Supreme Court has held that requiring an indigent to serve a prison term when he cannot pay a fine violates the equal protection clause. Tate v. Short, 401 U.S. 395 (1971). The Court observed that the requirement had no rational basis: it did not serve a penal purpose, and it did not aid the State in collecting the fine, since the man was too poor to pay it. Id. at 4302. See also Williams v. Illinois, 399 U.S. 235 (1970). Likewise, requiring only those prison inmates who unsuccessfully appealed their cases to pay for their transcripts was found to have no rational basis. The Court reasoned that if the repayment provision was intended to reimburse the state's costs, the law was too narrow, and if it was to avoid frivolous appeals, it was too broad since many nonfrivolous appeals may also fail. Rinaldi v. Yeager, 384 U.S. 305 (1966).

8. Thus, in Goesaert v. Cleary, 335 U.S. 464 (1948) the court upheld a Michigan law prohibiting bartending licenses to most women. The Court held that the primary and most probable purpose - monopolizing jobs for men - was impermissible, but that another valid purpose - avoiding social and moral problems - could be inferred.

are deriving direct benefits from the school system. However, the denial of services or benefits to children because their parents fail or cannot do a specific act does not bear a reasonable relation to this purpose. If this were the purpose - to shift some education costs to parents of school children - the appropriate solution would be to bring some action against the parents, and not the children. Moreover, taking such an action against one who cannot pay is manifestly futile, See Tate v. Short, 401 U.S. 395 (1971). Thus, there is no reasonable relation between this purpose and means of implementing it.

The manifest unreasonableness of punishing children for the parents' failure to pay a fee persuaded the Court in one of the few fees cases brought in federal Courts, in Chandler v. South Bend Community School Corp., cir. no. 71 S 51, N.D. Ind., Aug. 26, 1971, where the court ruled:

> . . . Defendant herein has totally failed to present any reason why Plaintiff-students should incur sanctions for their parents' failure to pay school fees. The school fee collection procedure as applied to these minor-Plaintiffs, conditions their personal right to an education upon the vagaries of their parents' conduct, an intolerable practice condemned by this Court . . . .
>
> Although the . . . plaintiffs / in Wyman v. Jones, 39 Law Week 4085, Jan. 12, 1971/ did not advance an equal protection challenge, per se, the welfare-worker visits being attacked on Fourth Amendment grounds, the Court applied the traditional equal protection analysis generally used in determining the validity of denying welfare benefits. C.f.,,Dandridge, supra. The visits are found reasonable because the Court finds that such incursions serve more of a rehabilitative than a purely investigative function;

> thus the welfare procedure stands in a definite relationship to the goals of the A.F.D.C. program, a means of determining the needs of the children-beneficiaries. Applying the same analysis to the instant facts, we would conclude that a school serves an educational mission and that suspending students for obligations owed by their parents supports none of its goals with respect to its student-beneficiaries.

The Court did not rule on the legality of fees as between parent and school officials.

The Court in Johnson v. New York State Education Dept., 319 F. Supp. 271 (E.D. N.Y. 1970), affirmed, 449 F. 2d 871 (2d Cir. 1971) found to the contrary. The circuit court relied primarily on James v. Valtierra, 402 U.S. 137 (1971), a case which does not apply here because (1) in James plaintiffs challenged the California constitutional provisions for referendum alleging that on its face it discriminated against the poor, (2) the right to an education is vastly more important than the right to low rent housing claimed in Jones, (3) the countervailing state interest in James--public participation in governmental decisions--was much more important than the interest here (to save a relatively small amount of money). The Chandler decision is clearly more thoughtful, and reflects the entire scope of the Court's Fourteenth Amendment decisions, not just one isolated case.

C. Officials Must Show a Compelling Governmental Interest Before They Can Discriminate Against the Children of the Poor or Infringe Upon a Child's Fundamental Right to Education.

Although the traditional test alone provides a sufficient grounds for invalidating the fees requirements when applied to indigent plaintiffs, a stricter standard of review should be adopted in the instant case. This more stringent "active review" is appropriate in at least two kinds of cases -- those involving a "suspect classification" or those involving an infringement upon a fundamental right. Both elements appear in the case at bar.

1. "Suspect" classifications include classifications based on economic status.

The most familiar "suspect" classifications are those based on race. When faced with unequal treatment of races the Supreme Court has typically departed from the traditional "reasonable relation" test and required a showing of clear and compelling need. In fact, where the "trait" on the basis of which the legislative classification is made is an individual's race, the Supreme Court has come close to establishing a per se rule of unconstitutionality.[9] Like discrimination on account of race, discrimination on account of economic status is abhorrent to the basic principles of democracy. It can be equally humiliating; it can be equally arbitrary; and, when it concerns an impressionable child or youth, it can be equally debilitating. An economic distinction among children like a racial distinction, "generates a feeling of inferiority as to their status in the community that may effect their hearts and minds in a way unlikely ever to be undone." Brown v. Board of Education, 347 U.S. at 494.

9. In dicta, however, the Court continues to recognize the possibility that a state might justify racial classifications by means of some compelling state interest, McLaughlin v. Florida, 279 U.S. at 194. Possibly the Court would allow a benevolent racial classification, designed to compensate for past discrimination, but such a case has not yet come before it.

Distinctions based on race or economic status are serious indeed. Although difficult to compare distinctions based on poverty seem inherently less susceptible to explanation than are distinctions which usually appear before the Court in equal protection cases—unsuccessful prisoner-appellants, Rinaldi v. Yeager, 384 U.S. 305 (1966), large family size, Dandridge v. Williams, 397 U.S. 471 (1970), or servicemen, Carrington v. Rash, 380 U.S. 89 (1965). Therefore, the courts must require more than a rational basis to justify so invidious a discrimination. Thus, the Supreme Court has frequently made analysis between classifications based on wealth and race: "Lines drawn on the basis of wealth and property, like those of race . . . are traditionally disfavored." Harper v. Virginia Board of Elections, 383 U.S. at 668. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Griffin v. Illinois, 351 U.S. at 17 (1956). "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which independently render classification highly suspect and thereby demand a more exacting judicial scrutiny." McDonald v. Board of Election Commissioners of Chicago, 394 U.S. at 807 (1969). See, also, Hobson v. Hansen 269 F. Supp. 401, 507-08 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

The Supreme Court first departed from the traditional test to strike down an economic classification in Griffin v. Illinois, 351 U.S. 12 (1956). In Griffin the Court found a violation of the equal protection clause where the state denied the opportunity for an effective appeal of a criminal conviction to an indigent who could not afford to pay for the required transcript. Although the Court in Griffin did not directly discuss the different standards of review, it did, in fact, require Illinois to show a compelling need for its harsh rule. Under the traditional test, the requirement might have been justified on fiscal grounds. The costs of providing transcripts free to appellants would be exceedingly high, and a state has a valid interest in cost savings and recoupment. The Supreme Court in Griffin did not even consider this possible rationale, however. The Court's decision in Griffin was further clarified in Boddie v. Connecticut, 401 U.S. 371 (1971):

> We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in Griffin v. Illinois. . . .

In Boddie the Court held that it violated the due process clause of the Fourteenth Amendment for a state to deny access to divorce courts to those who are financially unable to pay the fees. In both cases the State was able to show some reasonable basis for its action, but the court required more. In both Griffin and Boddie the Court rejected the traditional test of constitutionality and required a "countervailing state interest of overriding significance." 401 U.S. at 377. See, also Id. at 380.

There is a striking parallel between the pivotal facts in Griffin, Boddie, and the case before the court. In all three situations all persons similarly situated had a right to receive some service -- a right to appeal, a right to dissolve a marriage, or a right to attend school. In order to secure this right fully, these persons were required to pay some cost or fee. Although most people could do so, indigents could not and were, therefore, denied their rights -- full access to the judicial process or full access to school. According to Griffin, the nature of the right involved is not of primary importance. The Court assumed in Griffin that Illinois was not required by the federal constitution to afford any appellate review. "But that is not to say that a state that does grant appellate review can do so in a manner that discriminates against some convicted defendants on account of their proverty" 351 U.S. at 18. Certainly, the constitution forbids making the quality of education a child receives depend upon the affluence of his parents, as readily as it forbids a situation where "the kind of trial a man gets depends on the amount of money he has" Griffin v. ILlinois, Id. at 19.

2. Children of the poor have a fundamental right to education.

Other equal protection cases where the Supreme Court has required a showing of compelling state interest include those where the classification infringed upon some "fundamental interest." This has included the right to vote, Kramer v. Union Free School, 395 U.S. 621 (1969), Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942), to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), and access to the courts and judicial due process, Griffin v. Illinois, 351 U.S. 12 (1956), Boddie v. Connecticut, 401 U.S. 371 (1971). In these cases, the governmental action "must be closely scrutinized and carefully confined" Harper v. Virginia State Board of Elections, 383 U.S. at 670 and cannot be upheld on a showing of rationality alone Kramer v. Union Free School District, 395 U.S. at 627-8.

These rights are of no greater importance than the right to an education. As early as 1954, a unanimous Supreme Court declared the fundamental importance of educational opportunity. In Brown v. Board of Education, 347 U.S. 483, 493 (1954), Chief Justice Warren wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . .

This precept has been adopted whole heartedly in lower courts. For example, in Wolf v. Legislature, Civ. No. 182646, Salt Lake County, Utah, 3d District Court, Opinion, Jan. 8, 1969, the court held:

> Education, today, is probably the most important function of state and local governments. It is a fundamental and inalienable right and must be so if /constitutional/ . . . rights guaranteed to an individual . . . are to have any real meaning. Of what value would be the right to assemble, the right to speak, the right to participate in one's own religion, if an individual were to be denied an education . . .

In Sullivan v. Houston Ind. School District, 333 F. Supp. 1149, 1172 (S.D. Tex. 1971), the court ruled:

> . . . Education . . . is a priceless commodity.
>
> Furthermore, it is a fundamental right of every citizen. Just as the Supreme Court has declared that United States citizenship cannot be revoked except by voluntary expatriation . . . so courts should declare that an individual's guarantee of an education, only quantitatively less basic than the right of citizenship, cannot be annulled, even temporarily, except in the most extreme circumstances.

And in Ordway, v. Hargraves, 323 F. Supp. 1155, 1158 (D. Mass. 1971), the Court noted that "It would seem beyond argument that the right to receive a public school education is a basic personal right." Finally, in Chandler v. South Bend Community School Corp., Civ. No. 71 S 51, N.D. Ind., Aug. 26, 1971, the court found education "a substantial right implicit in the 'liberty' assurance of the Due Process clause," and a necessary element in the effective exercise of rights guaranteed by the first eight amendments to the U.S. Constitution.

Our last four presidents have agreed with the courts. In an education message to Congress on January 29, 1963, President Kennedy said:

> Education is the keystone in the arch of freedom and progress. Nothing has contributed more to the enlargement of this Nation's strength and opportunities than our traditional system of free, universal elementary and secondary education, coupled with widespread availability of college education.
>
> For the individual, the doors to the schoolhouse, to the library, and to the college lead to the richest treasures of our open society: to the power of knowledge - to the training and skills necessary for productive employment - to the wisdom, the ideals, and the culture which enrich life - and to the creative, self-disciplined understanding of society needed for good citizenship in today's changing and challenging world.
>
> For the Nation, increasing the quality and availability of education is vital to both our national security and our domestic well-being. A free nation can rise no higher than the standard of excellence set in its schools and colleges. Ignorance and illiteracy, unskilled workers and school dropouts - these and other failures of our educational system breed failures in our social and economic system: delinquency, unemployment, chronic dependence, a waste of human resources, a loss of productive power and purchasing power, and an increase in tax-supported benefits. The loss of only 1 year's income due to unemployment is more than the total cost of 15 years of education through high school. Failure to improve educational performance is thus not only poor social policy, it is poor economics.

1963 U.S. Code Cong. and Adm. News, 1450 (89th Cong., 1st Sess.); See also 1969 Code at 2830 (President Nixon) (Proclamation on American Education Week, September 26, 1969); See also 1968 Code at 4648-9 (President Johnson) (Proclamation on American Education Week, August 29, 1968); 1965 Code at 1448-1449 (President Johnson) (Message on Education Act of 1965); 1958 Code at 5412 (President Eisenhower) (Message on Education).

Not only is education precious to the individual in its own right, but it also provides the tools necessary for exercising other rights which the Supreme Court has recognized as fundamental — voting, Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), speech, Lovell v. City of Griffin, 303 U.S. 444, 450

(1938), association, NAACP v. Alabama, 357 U.S. 449 (1958), and travel, Shapiro v. Thompson, 394 U.S. 618 (1969). The enactment by Congress of laws providing funding for educational programs also attests to its significance. See e.g. Elementary and Secondary Education Act of 1965, 20 U.S.C. 236-244, 331-332, 821-827, 841-848, 861-870, 881-885; National Defense Education Act of 1958, Title 20 U.S.C.; Johnson-O'Malley Act, Title 25 U.S.C. See also Coons, Clune, and Sugarmen, Private Wealth and Public Education 409-424; Kirp, The Poor, the Schools, and Equal Protection, 38 Harv. Ed. Rev. 635, 642-645 (1968); Michelman, The Supreme Court, 1968 Term, Forward: Protecting the Poor through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969); Goldstein, Developing Trends in the Law of Student Rights, 118 U. Pa. L. Rev. 612, 616 (1969).

Finally, it should be noted that the case is even more onerous here because of the special educational needs of the children of the poor. The governing standards require that great weight be given to the "interests of those who are disadvantaged by the classification." Kramer v. Union Free School District, 395 U.S. at 626. Attention to this factor demonstrates that this is an even clearer case for application of the Fourteenth Amendment than Griffin and its progeny. Here, there is a sound basis for arguing that the "interests of those who are disadvantaged" are stronger than the interests of other students. We take this position on the basis of legislation and literature which recognize both the critical importance of early childhood education and the need for special attention to the educational problems of the poor. It is proper for the court to consider these materials, Brown v. Board of Education, 347 U.S. 483, 494 n. 11 (1954); Skinner v. Oklahoma, 316 U.S. 535, 545n.1 (1942) (concurring opinion of Stone, C.J.); Griffin v. Illinois, 351 U.S. at 19; West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937); Mapp v. Ohio, 367 U.S. 653, 651-2, n. 7 (1961).

Congress has recognized the need for compensatory educational services to children of the poor in the Elementary and Secondary Education Act of 1965, Pub. Law 89-10. Title One of the law (20 U.S.C. 241a - 241m) is a comprehensive program for providing federal financial assistance to local school systems with concentrations of children from low income families. The congressional declaration of policy in Section 241a reads as follows:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this part) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. (emphasis added)

School systems are required by the law, implementing regulations and other statements of governing criteria promulgated by the Office of Education to concentrate Title I programs in those attendance areas with "high concentrations of children from low income families. . . ." 20 U.S.C. 241e(a) (1). Available expert evidence supports the conclusion of the Congress. See Benjamin S. Bloom, Allison Davis and Robert Hess, Compensatory Education for Cultural Deprivation (Holt, Rinehart and Winston, Inc., 1967); Benjamin S. Bloom, Stability and Change in Human Characteristics (John Wiley and Sons, Inc. 1964); J. McVicker Hunt, The Challenge of Incompetence and Poverty, "Papers on the Role of Early Education" (University of Illinois Press, 1969).

Thus, for children of the poor, education may be the only means by which they can escape the depressing and cyclical effects of poverty.

Their special need for education makes the denial of full access to the schools particularly harsh and unjust. This circumstance further strengthens the importance of the individual's interest in this kind of case. In as far as the court is balancing the compelling interests of the state against the fundamental interests of the individual, these special considerations for children of the poor should banish any thought that the fees policy might be justified.

In one of the two adjudicated fees cases in the federal Courts, the importance of education compelled the Court in Chandler v. South Bend Community School Corp. to apply the stricter standard of justification. This Court, in fact, found the fees policy void of any rational basis, and would have invalidated it under any standard, as discussed above. The Court in Johnson v. New York State Education Dept., 319 F. Supp 271 (E.D. N.Y. 1970), affirmed, 449 F. 2d 871 (1971) did not finally decide which standard to use.

D. When a Case Involves Both a Suspect Classification and a Fundamental Right, the State's Interest Must Give Way.

As discussed above, either of two conditions would trigger "active" review in this case -- the fact that the class receiving unequal treatment are poor, and the fact that they have a fundamental right to education. Either alone would be sufficient. Thus, in the absence of a compelling interest, a school may not prevent only its athletes from wearing long hair. Dunham v. Pulsifer, 312 F. Supp. 411 (D.Vt. 1970). The classification of students into athletes and non-athletes is not so invidious or suspect that this alone would trigger active review. Rather, the court found that a right to privacy was involved; the penumbra of the First and Ninth Amendments to the federal constitution made the right to determine hair style a particularly personal right which could not be abridged without a showing of compelling school interest. Id. at 418-19. In contrast, in Griffin v. Illinois, the court did not attach great weight to the right to an appeal, but it found the classification itself (poverty) so highly suspect that the more stringent test again seemed appropriate.

In some cases both elements exist, and the courts will sometimes find that the combined forces of both make it particularly appropriate to apply the "compelling state interest" test. See, e.g., Van Ducartz v. Hatfield, C.A. no. 3-71 civ. 243, D. Minn., Oct. 12, 1971; Hargrave v. McKinney, 413 F. 2d 328 (5th Cir. 1969); Serrano v. Priest, 487 P. 2d 1241, 1250-59 (S. Ct. Cal. 1971). Thus, it is not necessary that the unequal treatment go as far as to expel students from school. It is sufficient that access to some portion of the school program, even the athletic program, has effectively been denied to students because they are poor. As in Brown v. Board of Education, 347 U.S. 483 (1954), the separation of children into "separate but equal" schools is invalid, so are even partial deprivations of poor children invalid.

School officials in the case at bar have no overriding or compelling interest in punishing poor children for failure to pay fees. The school's interest in shifting the financial burden to parents, or raising funds to provide extra services to children is not served if the funds thus raised aid only a particular group of children. The punishment does not -- indeed, it cannot -- prompt the parents of these children to produce the funds, for they do not have them. The school has no greater chance of increasing its revenues, but the children have an ever diminishing educational opportunity. The school's interest in conserving existing funds is also questionable because the amount of money which could be collected from poor students is negligible. Even if conservation of funds were considered a rational basis for the policy in question, it is hardly sufficient to justify the great injustice which is done to those who are unable to pay the required fees. Cost savings was explicitly rejected in Shapiro v. Thompson, where the Court said (394 U.S. at 633, emphasis added, footnotes omitted):

> We recognize that a State has valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens. It could not for example reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

Cost savings was rejected in effect in Griffin v. Illinois, 351 U.S. 12 (1956), and all of its progeny, and in Gideon v. Wainwright, 372 U.S. 335 (1963). It was explicitly rejected as a justification in Boddie v. Connecticut, 401 U.S. 371 (1971). It should be rejected here.

DISCOVERY CHECKLIST

1. Written statements of fees policies, school board resolutions, minutes and records of votes, etc.
2. For each fee charged, list amount, dates, type of course or activity (compulsory or elective?), whether all students in the particular grade affected are required to pay the fee, or whether payment must be made only by participants in the class or activity.
3. Names of students who have failed to pay fees.
4. Names of students who failed to pay fees and were disciplined for failure.
5. Description of disciplinary action.
6. Names of personnel responsible for administering fees policies.
7. Fees charged by persons other than representatives of the school districts (e.g., student or parents organizations).
8. Type of activity where fee required under #7, to whom paid, how much, dates, relation to school activities, cooperation of school officials.
9. Action taken against student not paying fees under #7.
10. Fee waiver policies.
11. Names of students who havehad fees waived, fee, date, amount, person authorizing waiver, documents relating to waiver, school board resolutions, minutes, etc.
12. Names of transfering students where school officials have withheld transcript for failure to pay fees, dates, fee, amount, other circumstances.
13. Academic action taken with respect to students who have failed to pay fees (exclusion from courses, fialing grades on courses, withholding of diplomas), etc.
14. Notices of fee charges given to parents or students.
15. Notice of action to be taken if fee is not paid.
16. Publicity attendant on the failure of a student to pay fees.